SUPREME COURT, U. S.

FILED

JUL 28 1969

CLERK

No. 296

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

THOMAS KADLEC, JAMES W. KADLEC, and ISAAC GRINSTEAD,

Petitioners,

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HARRY R. BOOTH
30 N. LaSalle Street
Chicago, Illinois 60602
Attorney for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statement of Grounds Upon Which This Court's Jurisdiction Is Invoked	2
Statutes Involved	3
Questions Presented	3
Statement Of The Case	4
Argument Supporting Reasons Relied on For Allowance of Petition	7
I. The Opinion of the Court of Appeals as a whole constitutes a departure from usual judicial proceedings.	7
II. The dismissal of Plaintiff's Amended Complaint was contrary to this Court's controlling decisions.	8
III. Plaintiffs demonstrated a probable violation of Amendment IV.	8
IV. IBT's acts were committed under color of law	12
V. Plaintiffs raised serious questions of violations of Amendments XIV and I.	14
Conclusion	16
Appendix:	
Statutes, etc.	App. 1-App. 5
Court Opinions:	
Court of Appeals	1
District Court (First Opinion)	9
District Court (Final Opinion)	16

TABLE OF CASES AND OTHER AUTHORITIES

PAGE

Andrews v. Ches. & Pot. Tel. Co., 83 FS 966, 968, 969 (U.S. Dt. Ct. Col. 1949) 15

Baker v. Carr, 369 U.S. 186, 199, 200 8

Bell v. Hood, 327 U.S. 678, 682 8

Berger v. New York, 388 U.S. 41, 57, 59 8

Burton v. Wilmington Par. Auth., 365 U.S. 715, 722 ..8, 12

Camara v. Mun. Ct., 18 L. Ed. 2nd 930 (1967) 9, 10, 11

Cohen v. Norris, 300 F. 2nd 24, 27-31 10

Eaton, et al v. Grubbs, 329 F. 2nd 710, 713 13

Evans v. Newton, 382 U.S. 296, 300 .....12, 13

Foman v. Davis, 371 U.S. 178, 182 8

Freedman v. Maryland, 380 U.S. 51, 59, 60 16

Go-Bart Importing Co. v. U.S., 282 U.S. 344, 356, 357 11

IBT Co. v. Miner, 136 N.E.2d 1, 8 .....13, 14

Katz v. U.S., 19 L. Ed. 2d, 576, 583 11

Laffler v. Cin. & Sub. Bell Tel. Co., 144 N.E. 2d 158 (Ohio) 13

Monroe v. Pape, 365 U.S. 1967 10

Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 8

Saia v. N.Y., 344 U.S. 588, 561, 562 15

Sarelas v. Illinois Bell Tel. Co., 192 NE2d 451, 453 (Ill. App. 1963) 13, 14

See v. Seattle, 18 L. Ed. 2d 943 (1967) 9, 10, 11

PAGE

Shelley v. Kramer, 334 U.S. 1, 19 13

Silverthorne Lumber Co. vs. U.S., 251 U.S. 385 11

Sokol v. PUC, 418 Pac. 2d 265, 270 (Cal. Sup. Ct. 1966) 14, 15

Taglianetti v. New Engl. Tel. & Tel. Co., 81 R.I. 351, 103 A. 2nd 67, 71 (1954) 12

Telephone News System v. IBT, 220 F. Sup. 621, 625 (Dt. Ct. Ill.) 15

U.S. v. Drugs, 282 F.S. 543, 545 (Dt. Ct. Fla. 1968) 10

78 Yale Law Journal, 448, 462; Public Utilities and the Poor, Jan. 1969 ..... 9, 14

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment I 3, 4, 5, 14

Amendment IV 3, 4, 5, 9, 10, 11

Amendment XIV 3, 4, 5, 14, 15

Statutes—42 U.S.C. 1983 ..... 3, 4, 10, 11, 12, 13

42 U.S.C. 1985 ..... 3, 4, 5, 10

28 U.S.C. 1343 ..... 3, 4, 10, 11

28 U.S.C. 1331 (a) 3, 4

Illinois Statutes, Ill. Rev. Stat. 1967, Chap. 111-2/3 3

Sec. 32 3

Sec. 63 ..... 3, 14

Illinois Bell Telephone Company, Reg. No. 5 ..... App. 4A

In the Supreme Court of the United States

OCTOBER TERM, 1968

NO. ____

THOMAS KADLEC, JAMES W. KADLEC, and ISAAC GRINSTEAD,

Respondent.

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Petitioners,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Now comes Thomas Kadlec, James W. Kadlec and Isaac Grinstead, Petitioners herein, and respectfully prays that a Writ of Certiorari issued to review the final judgment of the Court of Appeals for the Seventh Circuit in this cause.

OPINIONS BELOW

The decision of the Court of Appeals was filed on February 25, 1969 and has not been reported. Neither was the District Court's opinion dismissing the Amended Complaint rendered on February 7, 1968 or its first opinion of October 13, 1967. All are reproduced in Petitioners' Appendix.

JURISDICTION

The judgment of the Court of Appeals was issued on February 25, 1969 and plaintiff's Petition for Rehearing was denied on April 1, 1969. The jurisdiction of this Court is founded upon 28 USC Sec. 1254 (1).

STATEMENT OF GROUNDS UPON WHICH THIS COURT'S JURISDICTION IS INVOKED

This Court's jurisdiction is invoked upon the following grounds:

1. The Court of Appeals has decided the following federal questions contrary to applicable decisions of this Court.

a. It affirmed dismissal of plaintiff's Amended Complaint though both it and the District Court apparently recognized such Complaint was predicated upon constitutional and federal questions. No finding was or could be made such issues were unsubstantial or frivolous.

b. IBT's search and entry upon plaintiff's business establishment without consent, notice, a search warrant or a hearing presented serious questions of probable violation of Amendment IV.

c. IBT's such acts and other conduct at issue here constituted acts under color of law within 42 USC 1983.

d. Damages are recoverable for violations of Amendment IV arising out of either civil or criminal proceedings under 42 U.S.C. 1983 and 28 U.S.C. 1343.

2. In the alternative the Court of Appeals departed from the accepted and usual course of judicial proceedings by entirely disregarding petitioners' claims of violation of Amendment IV.

3. In the alternative the questions referred to in paragraph 1 present important questions of federal law which

should be settled either now or ultimately by this Court. This is also true (a) whether the acts of IBT in discontinuing plaintiff's telephone service without notice or hearing violated their due process procedural rights under Amendment XIV, Sec. 1 and (b) whether IBT's acts in depriving plaintiff Grinstead of all means of telephone communication without prior notice or a hearing violated Amendment I.

STATUTES INVOLVED

The federal statutes involved are 42 U.S.C. 1983, 1985 28 U.S.C. 1331 (a) and 1343. The constitutional provisions are Amendments I, IV and XIV, Sec. 1 of the Constitution. IBT is alleged to have acted under color of law as a public utility pursuant to chap. 111⅔ Ill. Rev. Stat., 1967 and more particularly, Sec. 32 par. 3 IBT Regulation 5 is included in the opinion of the Court of Appeals. (p. 2)

QUESTIONS PRESENTED

1. Did plaintiffs Amended Complaint raise serious questions whether defendant's (IBT's) acts were under color of law within 42 U.S.C. 1983.

2. Did plaintiffs raise serious questions under Amendments I, IV, or XIV Sec. 1 or either of them.

3. Were plaintiffs erroneously denied a trial of the merits since both courts treated the issues or one or more of them as substantial and made no finding that the Amended Complaint was frivolous or unsubstantial.

4. Assuming the facts pleaded can be established at the trial were Plaintiffs, or either of them, denied rights, privileges or immunities secured by the Constitution and laws of the United States within 42 U.S.C. 1983, 1985 and 28 U.S.C. 1343.

STATEMENT OF THE CASE

The original complaint was filed by plaintiffs Thomas Kadlec and James Kadlec. Upon the filing of the Amended Complaint (referred to by the Court of Appeals as the second Amended Complaint as amended) Isaac Grinstead was added as a Plaintiff. The Court of Appeal's statement of facts is predicated almost entirely upon the original complaint but it omitted material allegations found in all pleadings. In this Petition, Petitioners though relying upon his Amended Complaint as amended (hereinafter referred to as Amended Complaint or A.C.) finds it necessary to supplement the statement of facts (p. 1-3) of the Court of Appeal's opinion for it not only has disregarded the crux of such pleadings, but also contains other serious errors with respect to all pleadings.

Plaintiff sought damages against IBT under 42 U.S.C. 1983, 1985, 28 U.S.C. 1331(a) 1343, and Amendments I, IV and Sec. 1 of Amendment XIV. (par. 3 AC) Such damages were claimed "for the deprivation of rights and privileges secured by the laws and Constitution . . . arising out of (a) its unlawful entry under color of law upon the property of the Plaintiffs or one or more of them (b) the abridgement of the right of freedom of speech and means of communication under color of law in violation of Amendment I, and denial of due process in violation of Section 1 of Amendment XIV and (c) the violation of 28 U.S.C. Sec. 1983 and 1985 by acts more fully shown herein." (par. 4 A.C.).

1. Plaintiffs' Amended Complaint included the following allegations relevant to Amendment IV.

(20) "On or about March 16, 1967, IBT, its agents and employees or either of them, entered the

property of the plaintiffs, Thomas Kadlec and James W. Kadlec, or one or more of them, in Niles and Kankakee County, Illinois and engaged in a search of such premises and property."

(21) "Such search was conducted by IBT under color of law."

(22) "Such search was conducted by IBT without prior notice to the plaintiffs or either of them or without their consent." (Last four words added by Amendment R. 173, App. 12)

(23) "Such search was conducted without a hearing, a search warrant or judicial proceeding."

(24) "Said search constituted an unreasonable search in violation of Amendment IV of the Constitution of the United States and (R. 111) constituted a deprivation of the rights of plaintiffs secured by the Constitution and the laws of the United States." (R. 110, 111; App. 7, 8)

2. The Court of Appeals thus committed an error when it said (p. 3):

"The sole issue presented is whether defendant's conduct of discontinuing plaintiff's Call-Pak service, fell within the purview of the Civil Rights Act, 42 U.S.C.A. 1983."

3. The first complete paragraph on page 2 is also in error in stating that IBT contracted with Thomas Kadlec to install three Call-Pak lines including one in Grinstead's trailer. Grinstead (night-watchman) had no such telephone facilities and the Amended Complaint alleges that telephone service was used by him and his wife for usual residential purposes (par. 10) except for occasional use to aid in protecting Tom Kadlec's business against fire or theft. (par. 11) Grinstead's bills seldom exceeded $10 per month. (par. 13)

4. The statement (p. 2) that IBT shut off the Call-Pak service because it determined the service was used for other than residential purposes was not supported by allegations in plaintiff's pleadings and in fact, IBT made a variety of ex-parte judgments of alleged illegal use (non-criminal in character) without notice or a hearing.

5. The reference (p. 3) to the District Court's final opinion is incomplete in that it fails to state that the District Court specifically, though erroneously concluded, plaintiff's allegations with respect to Amendment IV did not come within the principles of the *Camara and See* cases (18 L Ed 2d 930, 18 L Ed 2d 943).

6. Plaintiff not only alleged that IBT's acts were under color of law and regulations of the state of Illinois, but such regulations were null and void and contrary to Amendments I, IV, and XIV. (pars. 21, 29, 31) It was further alleged that IBT acted in concert with officers and agents as well as agents of the state of Illinois in depriving plaintiffs or one or more of them of their civil rights and equal protection of the laws in violation of 42 U.S.C. 1985. (par. 32)

7. The Court's reference to the initial pleading omits allegations that the entry was upon threat of discontinuing all Plaintiffs' telephone service in Kankakee and Niles, Illinois, and that they entered and seized telephone equipment previously used upon the threat of discontinuing all Plaintiffs' telephone service and that all such acts were under color of law or by virtue of regulations having the force and effect of law. IBT was also accused during such search of secretly collecting information "as to the law abiding character of such subscribers". (IBT App. 7, 8)

ARGUMENT SUPPORTING REASONS RELIED ON FOR THE ALLOWANCE OF PETITION

I. THE OPINION OF THE COURT OF APPEALS AS A WHOLE CONSTITUTES A DEPARTURE FROM USUAL JUDICIAL PROCEEDINGS.

Opinions of the Court of Appeals are not expected to be standardized but this Opinion has strange aspects affecting the substance of Petitioners' rights. It is apparent that the Court ruled primarily upon the original complaint, relied on only a few of its allegations, disregarded the crux of both the initial and final pleadings and in lieu of a trial on the merits substituted its speculations as to material facts.

By their Amended Complaint filed after the first opinion of the District Court they eliminated demands for restoration of service, injunctive orders and confined their claims to damages arising out of the alleged numerous wrongful acts of the defendant, IBT, in searching the residential and business premises of the plaintiffs and shutting off their service without notice, a hearing, a search warrant or their consent. Since the Court of Appeals considered the initial complaint relevant, it was strange it omitted all reference to the search and entry upon plaintiffs' premises under threat of discontinuing all telephone service. (IBT App. p. 7)

It may have been possible for the Court of Appeals to have reached a correct conclusion without a single reference to any of the opinions of this Court, but their proper purpose is to instruct not only the bar but all courts seriously concerned with proper determination of constitutional rights.

II. THE DISMISSAL OF PLAINTIFFS' AMENDED COMPLAINT WAS IN CONFLICT WITH THIS COURT'S CONTROLLING DECISIONS.

Since 1902 or earlier, this Court has repeatedly declared it to be improper to dismiss a suit instituted in a federal court upon claims arising under the Constitution and laws of the United States other than by a judgment on the merits. This rule is especially applicable where, as here, subject matter jurisdiction is recognized. This rule permits dismissal only when the claim is found "so attentuated and unsubstantial as to be absolutely devoid of merits". *Newburyport Water Co.* v. *Newburyport,* 193 US 561, 579. These and other leading opinions so holding were reviewed in *Baker* v. *Carr,* 369 US 186, 199, 200. See also *Bell* v. *Hood,* 322 U.S. 678, 682.

Even in non-constitutional cases, this Court declared in *Foman* v. *Davis,* 371 US 178, 182:

> "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."

Neither the District Court or the Court of Appeals found plaintiffs' claims unsubstantial or frivolous. Their opinions failed to refer to or to distinguish these principles or refer to any of the rulings of this Court pronouncing them.

Illustrating the need for a trial in a case such as this presenting new issues of state involvement in private conduct, this Court in *Burton* v. *Wilmington Park. Auth.,* 365 US 715, 722, declared it can be done only "by sifting facts and weighing circumstances."

Operations by public utilities are far from exclusively private conduct. In fact the ruling by the Court of Appeals that regulations filed by IBT with the state and its conduct thereunder does not constitute acting under the

authority or pretense of an Illinois statute or a regulation defies elementary recognition that tariffs and regulations of utilities are approved by state or federal regulatory agencies. Petitioners' contention finds support in 78 Yale Law Journal, 448, 462, Public Utilities And The Poor, January 1969. The need for a hearing is further shown by Judge Kerner's separate opinion, even though the obvious answer to the first of the six factors is in the affirmative.

Plaintiffs were arbitrarily denied the benefit of the principle entitling them to a hearing on the merits.

III. PLAINTIFFS ALLEGED FACTS DISCLOSING AT LEAST A PROBABLE VIOLATION OF AMENDMENT IV.

The Court of Appeals departed from the accepted and usual course of judicial proceedings by failing to consider Plaintiffs' primary claim *I B T's* search and entry upon their premises presented a serious question under the Fourth Amendment. The District Court considered the issue but erroneously concluded inapplicable this Court's recent decisions in *Camara* v. *Mun.Ct.*, 18 L.Ed. 2d 930 (1967); and *See* v. *Seattle*, 18 L.Ed. 2nd 943. It said:

> "Illinois Bell, although a public utility, it is not a governmental entity. Defendant's right to inspect its equipment at reasonable hours is set forth in the tariff regulations governing its operations. Plaintiffs have not made a persuasive argument to justify extending the rationale of *See* and *Camara*, and we shall not do so. Hence, plaintiff's allegations on this point do not state a claim upon which this action may be based."

The application of Amendment IV to acts of administrative agencies was upheld in *See* v. *Seattle*, 387 U.S. 541, 545 which declared that administrative subpoenas are governed by the 4th Amendment. While agreeing that such

agencies possessed the right to conduct all reasonable inspections, searches must be predicated upon the designation of documents in a formal subpoena, they may not be made "and enforced by the inspector in the field and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply". (p. 544, 545).

Insofar as the Court's silence on Plaintiffs' claims under 1983, 1985 and 1343, as related to Amendment IV should be interpreted as a holding that they do not permit recovery of damages arising out of civil proceedings, the Court is in error.

The application of Amendment IV to state action is no longer open to question. This Court has held it applicable to both criminal and civil proceedings. In *Monroe* v. *Pape*, 365 U.S. 167 the Court's jurisdiction was asserted as here under 42 U.S.C. 1983, 28 U.S.C. 1343 and 28 U.S.C. 1331. Damages were held recoverable for violation of Amendment IV by a person charged with a state crime. This decision was followed in *Cohen* v. *Norris*, 300 F.2d 24, 27-31. Damages would also be recoverable here for in *Camara* and *See*, this Court held Amendment IV applicable to state action violative of Amendment IV arising out of civil proceedings. In *U. S.* v. *D. or S. Drugs*, 282 F.S. 543, 545, (DT. Ct. Fla. 1968) held Amendment IV applicable to civil seizures relying upon this Courts recent holdings that it had cut away from "technical distinctions (and) emphasizing the Amendments substantive protection of a man's privacy against government intrusion". If we are correct in contending that IBT acted under color of law or a serious question exists as to whether it did, plaintiffs were entitled to a trial and this Court should grant this Petition.

By such IBT's search of Plaintiffs' premises without consent or a search warrant, IBT not only acted under color of law but it deprived Plaintiffs or one or more of them of rights, privileges and immunities secured by the constitution and for which damages are recoverable under 28 U.S.C. 1343 (1) (3) and 42 U.S.C. 1983.

The issue here is whether IBT, by the mere filing of a general regulation approved by an Illinois agency, can deny its customers all prior opportunity for a hearing, notice or consent to the entry upon customers' premises. Surely the state has intervened, for by the filing of the regulation and approval, utilities such as IBT avoid liability for trespass.

If Illinois may not send its agents into the homes of millions of its citizens, to check or investigate the legal or illegal use of equipment in bedrooms, kitchens, playrooms and business offices or properties, can it confer such blanket authority upon a public utility? We think not.

The concern this Court has exhibited over the protection of people under Amendment IV in the recent cases illustrated by *See, Camara, Katz* v. *U.S.*, 19 L. Ed. 2d 576, 583; *Berger* v. *New York*, 388 U.S. 41, 57, 59; *Silverthorne Lumber Co.* v. *U.S.*, 251 U.S. 385; *Go-Bart Importing Co.* v. *U.S.*, 282 U.S. 344, 356, 357.

The holding of this Court in *Katz* that his protection applies "to a home, an office, or hotel room" or a telephone booth. *"Wherever a man may be, he is entitled to know he will remain free from unreasonable searches and seizures"*. (p. 358) The protection afforded the public under the Fourth Amendment from government agencies and agents would be meaningless if the state can confer such illegal power upon agents of private, quasi private or public companies.

This paramount issue was improperly disregarded by the Court of Appeals and was erroneously decided by the District Court.

IV. THE COURT ERRONEOUSLY CONCLUDED IBT'S ACTS WERE NOT COMMITTED UNDER COLOR OF LAW.

The ruling of the Court of Appeals affirming the District Court's dismissal was largely predicated upon the decision in *Taglianetti* v. *New England Tel & Tel Co.*, 81 R.I. 351, 103 A. 2d 67, 71 (1954). It rejected reliance upon *Evans* v. *Newton*, 382 U.S. 396, 300 and *Burton* v. *Parking Authority*, 365 U.S. 715 in favor of a state decision unconcerned with the special obligations imposed upon the federal courts to independently determine civil rights and constitutional issues in the light of this Court's pronouncements. Moreover, its conclusions are wholly at war with the proper conception of section 1983 and the participation by the state in IBT's conduct.

The Rhode Island view that for purposes of state law, tariffs are not acts of the state, are not binding on the federal court's independent duty to interpret Sec. 1983. Furthermore, the Rhode Island view of tariffs are simply designed to inform patrons of their rights (or lack of them) is inconsistent with the holdings of the Illinois Courts. Under Illinois law the tariffs are the true and sole source of obligations, a principle written into Illinois law, when IBT found it to its economic advantage to request the Illinois Courts to adopt it. In *Sarelas* v. *Illinois Bell Tel. Co.*, 42 Ill. App. 2d 372, IBT through State cooperation and participation was absolved from an action for damages when the Court held:

> "This duty has but one source, the tariff, which in this instance is on file with the Illinois Commerce Commission."

And in another IBT case, *IBT Co.* v. *Miner*, 11 Ill. 2d 44, again through state participation and co-operation, the Court adopted the view that its tariffs by operation of law bind both the subscribers and the company. In other words IBT's attorneys "motivated by purely economic interest" (p. 4) promote different legal concepts in the state and federal courts for the identical object of nullifying public protection under both sets of statutes. *Miner* held the tariffs gave IBT power to bar the sale of telephone directory covers.

We are not alone in the view that utility tariffs represent state action under 28 U.S.C. 1983. A recent Yale Law Journal discussing utility tariffs states:

> "Lying behind these questions, and lending them special significance, are serious constitutional problems of due process and equal protection. Though some courts have failed to see 'state action' in the filing and approval of a utility tariff, state regulation and supervision of public utilities constitute sufficient intervention to cloak a deposit requirement with governmental authority."[1]

A search and entry into a private home or business property is far greater evidence of governmental authority and state participation in the conduct of a utility than the requirements of deposits under other tariffs approved by regulatory agencies. Except for state intervention, *Shelley* v. *Kramer*, 334 U.S. 1, 19, IBT would not enter the premises of Plaintiffs or its other customers.

In *Evans* v. *Newton* the Court declared the test of state action includes "functions government in nature", (p. 300). Under this premise the Court in *Eaton et al.* v. *Grubbs*, 329 F.2d 710, 713 held that since the hospitals in-

[1] 78 Yale Law Journal, 448, 462; Public Utilities and the Poor Jan. 1969.

volved have been granted the power of eminent domain they were subject to 42 U.S.C. 1983 and Amendment XIV. IBT possesses such power. Chap. 111⅔ Ill. Rev. Stat. 1965 Sec. 63.

The Court's conclusion (pp. 4, 5) that the state did not cooperate, benefit, or that IBT's acts did not depend upon "orders of the state" (p. 5 FM) is contrary to Plaintiffs' allegations and common knowledge. First of all it was alleged that IBT's acts in discontinuing service and entering upon the premises of its customers were based on regulations, (par. 5 AC), that the regulations and rules and laws of Illinois or IBT violated Amendments I, IV and XIV and that the acts in shutting off service was under regulations of the state (par. 29) and had the force and effect of law. (Df.'s App. p. 7). This principle was confirmed in *Miner* and *Sarelas, supra.*

It is common knowledge that all such regulations are approved by state agencies. The purpose of the regulatory scheme is to assure an adequate system of telephone service and the regulations to the extent to which they fulfill these objects benefit the state. The state thus contrary to the erroneous conclusion of the Court of Appeals benefit, cooperate and approve the regulations.

V. PLAINTIFFS RAISED SERIOUS QUESTIONS OF VIOLATIONS OF AMENDMENT XIV AND I.

By IBT's acts in shutting off Plaintiff Grinstead's sole source of telephone communication with the outside world he was denied rights under both Amendments I and XIV. He was denied any prior notice or an opportunity for a hearing. His trailer was located in a non-populated area of Kankakee. In *Sokol* v. *Public Utilities Commission*, 418 Pac. 2d 265, 270, (1966), the California Supreme Court re-

cently held the arbitrary discontinuance of telephone service "also affects his right of free speech as guaranteed by the First Amendment of the federal constitution" for it denies the public the means employed for the dissemination of speech. See also *Saia* v. *N. Y.*, 334 U.S. 558, 561, 562.

The Court of Appeals disregarded state and federal Court rulings holding that arbitrary discontinuance of telephone service may deny a subscriber's rights of due process. In *Telephone News System* v. *IBT*, 220 F. Sup. 621 Judge Hoffman of the District Court declared "It seems probable that one's right to telephone service is a property right within the protection of this Amendment". (p. 625) The discontinuance of telephone service without prior notice or an opportunity for a hearing violates due process under: *Sokol* v. *PUC*, 418 Pac 2d, 265, (Cal. Sup. Ct. 1966); *Laffer* v. *Cin. & Suburban Bell Tel. Co.*, 144 N.E. 2d 158 (Ohio); *Andrews* v. *Ches. & Pot. Tel. Co.*, 83 FS 966, 968, 969 (US DT. Ct. Col. 1949).

In *Andrews* the District Court condemned as contrary to due process the ex parte discontinuance of telephone service by either a utility or a public utility regulatory agency.

In the *Telephone News* case, also IBT, the Court declared federal statute providing for the discontinuance of telephone service (18 U.S.C. 1084 (d)) was valid as it expressly provided for notice, hearing and an opportunity for judicial intervention prior to discontinuance of service. Here IBT becomes the judge and prosecutor when, without notice or hearing, it enters and searches a business establishment, and shuts off telephone service because it believes Plaintiffs may have violated its regulations.

Plaintiffs were denied the benefits of the principle that one who seeks to restrain freedom of communication must first obtain some type of specific judicial approval after a hearing. *Freedman* v. *Maryland,* 380 U.S. 51, 59. This case does not come within the category of the principle that a utility may discontinue service for a nonpayment of bills but even in such instances it must first give notice. Plaintiffs were denied even this slight symbol of due process.

CONCLUSION

Petitioners having demonstrated serious errors affecting constitutional rights in the opinion and judgment of the Court of Appeals, they pray that this Honorable Court grantd this Petition for a Writ of Certiorari.

Respectfully submitted,

HARRY R. BOOTH
30 North LaSalle Street
Chicago, Illinois
Attorney for Petitioners

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment I

Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES—42 U.S.C. 1983 Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured and an action at law, suit in equity, or other proper proceedings for redress.

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

. . . .

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any such act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. § 1980.

28 U.S.C. § 1343. Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

28 U.S.C. 1331(a) the district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

ILLINOIS STATUTES, CHAPTER 111-2/3
ILLINOIS REVISED STATUTES 1967

Sec. 32. General duties of public utilities. . . .

"All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

Section 63 Eminent Domain

59. When necessary for the construction of any alterations, additions extensions or improvements ordered or authorized under sections 50 or 58 or subdivision (a) of sections 81 of this Act[1] any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

Rules and Regulations—

ILL. C. C. NO. 1
Section 1
Second Revised Sheet 1
Canceling First Revised Sheet 1

ILLINOIS BELL TELEPHONE COMPANY
GENERAL LOCAL EXCHANGE TARIFF
TELEPHONE SERVICE
GENERAL REGULATIONS

. . . . .

5. OWNERSHIP AND USE OF THE EQUIPMENT —Equipment, instruments and lines on subscriber's premises, furnished by the Telephone Company, shall be and remain the property of the Telephone Company, whose agents and employees have the right to enter said premises at any reasonable hour for

---

[1] Sections 50, 62, and 85 par. (a) of this chapter.

the purpose of installing, inspecting or repairing the instruments and lines or for the purpose of making collections from coin boxes and, upon the termination of the service, for the purpose of removing such instruments and lines. Such equipment is not to be used for performing any part of the work of transmitting, delivering or collecting any telephone message where any toll or consideration has been or is to be paid any party other than the Telephone Company, without the written consent of the Telephone Company.

. . . .

Issued June 30, 1964 Effective August 1, 1964
By G. L. Seaton, Assistant Vice President
212 West Washington Street, Chicago, Illinois, 60606

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1968 — SEPTEMBER SESSION, 1968

No. 16901

THOMAS KADLEC, JAMES W. KADLEC, and ISAAC GRINSTEAD,
Plaintiffs-Appellants,
v.
ILLINOIS BELL TELEPHONE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 25, 1969

Before CASTLE, *Chief Judge*, HASTINGS, *Senior Circuit Judge*, and KERNER, *Circuit Judge*.

HASTINGS, *Senior Circuit Judge*. Plaintiffs Thomas Kadlec, James W. Kadlec and Isaac Grinstead appeal from an order of the district court granting defendant Illinois Bell Telephone Company's motion to dismiss plaintiffs' second amended complaint, as amended.

Plaintiffs Thomas and James W. Kadlec are engaged in the business of selling automobile parts, rebuilding parts and providing a towing service. The business is operated at two locations, the largest of which, known as Kankakee Auto Parts, is near the city of Kankakee, Illinois. The other establishment, Skokie Automotive, is located in Niles, Illinois. Plaintiff Grinstead is a night

watchman at the Kankakee location and lives in a trailer just outside such property.

Illinois Bell contracted with Thomas Kadlec to provide and install three Call-Pak lines. Pursuant to these agreements, defendant installed Call-Pak service in plaintiff Grinstead's trailer; another line was supplied a small house, presumably Thomas Kadlec's residence, situated on the Kankakee business property; and the third installation was made on the Niles property at the residence of James Kadlec.

Designed for residential use exclusively, Call-Pak service provides telephone service at a flat fee instead of at a rate based upon the time-distance-unit cost formula which is customary with business telephone service.

On March 16 and 17, 1967, pursuant to Illinois Bell's regulations[1] and sometime after the installation of these Call-Pak lines, defendant terminated its Call-Pak service to plaintiffs; *other telephone service provided to plaintiffs by defendant was not discontinued.* The "shut-off" of the Call-Pak service obviously was the result of defendant's determination that plaintiffs had been improperly using this particular service for other than residential purposes.

Plaintiffs' original complaint, as amended, alleged that defendant's action of discontinuing the Call-Pak service violated their constitutional rights. They further con-

[1] Appellants' residential Call-Pak service was discontinued by the defendant pursuant to its tariff which is on file with the Illinois Commerce Commission.

Apparently, defendant terminated the service on the authority of the following regulation contained in the tariff:

"OWNERSHIP AND USE OF THE EQUIPMENT — Equipment, instruments and lines on subscriber's premises, furnished by the Telephone Company, shall be and remain the property of the Telephone Company, whose agents and employees have the right to enter said premises at any reasonable hour for the purpose of installing, inspecting or repairing the instruments and lines or for the purpose of making collections from coin boxes and, upon termination of the service, for the purpose of removing such instruments and lines. Such equipment is not to be used for performing any part of the work of transmitting, delivering or collecting any telephone message where any toll or consideration has been or is to be paid any party other than the Telephone Company, without the written consent of the Telephone Company."

tended that the regulations under which defendant terminated this service violate the Federal Constitution. In addition, plaintiffs prayed for restoration of the Call-Pak service and for damages for defendant's allegedly wrongful termination of appellants' service. The district court in a written memorandum opinion dismissed the original amended complaint on the ground that the proper forum for the action was the Illinois Commerce Commission rather than the district court.

Following this dismissal, plaintiffs filed a further amended complaint which asked only for damages on the grounds that defendant's conduct had violated the Civil Rights Act, 42 U.S.C.A. § 1983, and Amendments I, IV, XIV of the Constitution. This amended complaint, together with a subsequent amendment thereto, was dismissed by the district court for failure to state a cause of action. Appeal is taken from the dismissal of this second amended complaint, as amended.

The sole issue presented is whether defendant's conduct of discontinuing plaintiff's Call-Pak service fell within the purview of the Civil Rights Act, 42 U.S.C.A. § 1983, which provides:

> "Every person who, *under color of* any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured and an action at law, suit in equity, or other proper proceedings for redress." [Emphasis supplied.]

or within the conspiracy section of the Act, § 1985.

It is well-settled that in order to establish a claim for damages under § 1983 of the Civil Rights Act the conduct complained of must have been engaged in under color of law and such conduct must have infringed upon the rights, privileges or immunities secured to the complaining party by the Constitution or laws of the United States. *Haldane* v. *Chagnon*, 9 Cir., 345 F. 2d 601, 603 (1965); *Duzynski* v. *Nosal*, 7 Cir., 324 F. 2d 924, 930 (1963); *Jemzura* v. *Belden*, N.D.N.Y., 281 F. Supp. 200, 205-06 (1968).

At least one of the two elements essential to maintaining a claim under § 1983 is missing in the instant case. Under the facts of this case, we are of the opinion that defendant telephone company was not acting under the authority or pretense of any Illinois state statute, regulation, custom or usage in discontinuing plaintiffs' Call-Pak service. Thus, the second amended complaint, as amended, was properly dismissed by the district court for failure to state a cause of action under § 1983.

Motivated by purely private economic interests and pursuant to its *own regulations*, Illinois Bell terminated plaintiffs' Call-Pak service. The only apparent state connection with the termination rests in the fact that defendant company filed its regulations with state authorities; the state in no sense benefited from, encouraged, requested or cooperated in this suspension of service.

The mere filing of these regulations with the state neither clothed Illinois Bell with state authority nor did it bring it under the aegis of the state. The § 1983 requirement of conduct taken under color of law "* * * can rarely be satisfied in the case of anyone other than a state official." *Jabson* v. *Henne*, 2 Cir., 355 F. 2d 129, 133 (1966); *Weyandt* v. *Mason's Stores, Inc.*, W.D.Pa., 279 F. Supp. 283, 288 (1968). Here, the nexus between the state and defendant's conduct was not sufficient to maintain an action under § 1983.

We have carefully reviewed the cases cited by plaintiffs in support of their contention that defendant telephone company acted under color of law. These cases are readily distinguishable from the instant case and are not controlling. In all of the cases cited where conduct under color of law was found to be present, there existed greater state involvement or control than is alleged in this case.

The rationale of the Supreme Court of Rhode Island in *Taglianetti* v. *New England Tel. & Tel. Co.*, 81 R.I. 351, 103 A. 2d 67, 71 (1954) is relevant to and in accord with our conclusions reached in the instant appeal. In *Taglianetti*, the court ruled that the acts of a telephone company, taken pursuant to its own regulations, could not be regarded as acts done under color of law simply because the company's regulations had been filed with and approved by an organ of the state. In reaching this conclusion, the court stated:

> "Regulations * * * are prescribed [by the telephone company] * * * solely to govern the use of its telephones by persons with whom it has contracted to provide telephone service and such regulations are in the nature of conditions attached to the right to the continuance of service. Action taken initially [by the company] * * * to impose the penalty therein prescribed for the violation of such conditions is in no sense action by the state. * * * [T]he fact that the regulations are filed with the division of public utilities and are approved by the administrator does not transform them into acts of the state. Such filing and approval are merely incidents of the state's regulatory supervision * * * and are designed to inform the patrons thereof of their rights and obligations in the use of the service * * *."

The issue of whether there was state action in *Taglianetti* was more sophisticated than in the present case. In *Taglianetti*, defendant telephone company disconnected the telephone there in question at the request of the police; in the case at bar, there is no indication that any branch or agency of the state ordered, requested or even encouraged the discontinuance of plaintiffs' service.[2]

Here there is no showing that defendant telephone company acted under color of law in terminating the service; as a consequence, no action for damages may be maintained under § 1983 of the Civil Rights Act. The district court's dismissal of appellants' second amended complaint, as amended, was proper and should be affirmed.

With respect to appellants' allegations under the conspiracy section of the Civil Rights Act, § 1985, we do not find facts sufficient to support such a claim; the pleadings with respect to § 1985 were merely conclusory in nature and therefore were properly dismissed by the district court.

The judgment of the district court is affirmed.

AFFIRMED.

[2] No opinion is expressed as to whether the results in this case would be altered if the defendant had terminated the appellants' service in cooperation with, at the request of or under the orders of the state.

KERNER, *Circuit Judge*, concurring in the result. I agree with my brethren that the mere filing of regulations with a state does not convert private action under such regulations into action under color of state law. Nor would it be sufficient to show color of state law to say that an action was performed by a person who functions under a state license, *e.g.*, barbers, doctors, horseshoers or polygraph operators. Nor is color of state law shown by the fact that a corporation or other group functions by virtue of a state charter of incorporation, registration as a foreign corporation or a certificate of doing business under an assumed name. Something more is required; whether it be action in concert with state or local officials, as in *United States* v. *Guest*, 383 U.S. 745 (1966), and *United States* v. *Price*, 383 U.S. 787 (1966), or something such as a business whose operation is so intertwined with the state as to be inseparable from it, as in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Meredith* v. *Allen Cnty. War Mem'l. Hospital Comm'n.*, 397 F. 2d 33 (6th Cir. 1968).

However, I do believe that, under appropriate circumstances, it may be possible to demonstrate that a privately-owned publicly-regulated utility or carrier or similar entity has a sufficient nexus with or dependence on a state as to make some of its actions under color of law. Some of the factors which should be considered are whether 1) the entity is subject to close regulation by a statutorily-created body (such as the Illinois Commerce Commission), 2) the regulations filed with the regulatory body are required to be filed as a condition of the entity's operation, 3) the regulations must be approved by the regulatory body to be effective, 4) the entity is given a total or partial monopoly by the regulatory body, 5) the regulatory body controls the rates charged and/or specific services offered by the entity, 6) the actions of the entity are subject to review by the regulatory body, and 7) the regulation permits the entity to perform acts which it may not otherwise perform without violating state law. There may be other factors to be considered besides those here enumerated. The enumeration here of particular factors means that less than all may be sufficient to show color of law in some cases and that nothing less than all may be required in other cases. Each case will depend on its facts. For example, in *Public Utilities Comm'n.* v. *Pollak*, 343 U.S. 451 (1952), the Court held (343 U.S. at 462):

> We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments. In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. 81 P.U.R. (N.S.), at 126. [Note omitted.]

See also cases cited in *Burton* v. *Wilmington Parking Authority, supra* at 725, n. 2, and *United States* v. *Price, supra* at 794-95, n. 7.

In order to prevail against a motion to dismiss for failure to state a cause of action, a complaint which relies on 42 U.S.C. § 1983 must affirmatively show that the acts complained of were done under color of law. The amended complaint before us lacks the specific allegations (as set forth above) which would show this necessary statutory element. Because this complaint fails at the threshold, it is not necessary to decide the issues relating to the alleged unconsented entry of defendant on plaintiffs' premises or the termination of service without notice and hearing.

For these reasons, I concur in the result reached by the majority.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

USCA 3695—The Scheffer Press, Inc., Chicago, Illinois—2-25-69—200

[89] IN THE UNITED STATES DISTRICT COURT.
* * (Caption—67-C-510) * *

MEMORANDUM OPINION.

Defendant's Motion to Dismiss

Plaintiffs claim that the actions of defendant Illinois Bell Telephone Company in discontinuing "Call-Pak" telephone service rendered to them in Kankakee and Skokie, Illinois, constitute a violation of their constitutional rights, as guaranteed by the First, Fourth, and Fourteenth Amendments. In addition, they allege that any regulations or laws under which Illinois Bell discontinued their service "violate and are contrary to Amendments I and XIV of the Constitution of the United States."[1]

[90] Jurisdiction is based on 28 U. S. C. Sections 1331 and 1343, and on the Civil Rights Act, 42 U. S. C. Section 1983, which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Defendant moves to dismiss on the grounds that plaintiffs have not exhausted their administrative remedies, and that plaintiffs have no constitutional right to Call-Pak service.

From the pleadings and briefs, the facts appear to be essentially these. Plaintiffs operate auto parts businesses

1. Paragraph 24 of the complaint.

in Skokie and Kankakee, which Illinois Bell services via business telephone lines. In addition, Illinois Bell contracted with plaintiffs to furnish two residential "Call-Pak lines, one to the home of Thomas Kadlec, and the other to a [91] small house located on the property of the Kankakee auto parts business." Such Call-Pak lines apparently are less expensive than commercial telephone lines, and are reserved for non-commercial use. A dispute arose over the propriety of the plaintiffs' use of the Call-Pak telephone service, and on March 16 and 17, 1967, pursuant to the tariffs and regulations on file at the Illinois Commerce Commission, the telephone company terminated the Call-Pak service but left the commercial service intact.

Although plaintiffs urge various constitutional grounds in support of their claims, defendant takes the position that only a contract dispute is involved. In any event, defendant insists that the proper forum for this action is before the Illinois Commerce Commission.

We agree. The Illinois Commerce Commission enjoys extensive regulatory power over telephone utilities pursuant to the Public Utilities Act of Illinois, Chap. 111⅔, Ill. Rev. Stat. The Commission has general supervision over the rates, classifications, contracts, practices, rules and regulations of telephone utilities. Section 72 of [92] the Act provides:

> ". . . No proceeding to contest any rule, regulation, decision or order which the Commission is authorized to issue without a hearing and has so issued shall be brought in any court unless application shall have been first made to the Commission for a hearing thereon and until after such application has been acted upon by the Commission, nor shall any person or corporation in any court urge or rely upon any grounds not set forth in such application for a hearing before the Commission . . ."

Plaintiffs charge that the rules and regulations relating to Call-Pak telephone service under which defendant discontinued plaintiffs' service, are unconstitutional. Therefore, according to the mandate of Section 72, they must proceed first before the Commission. Plaintiffs undisputedly have not taken this controversy to the Commission, but by virtue of their constitutional claims attempt to maintain jurisdiction initially in this court. They argue that the Illinois Commerce Commission has no power to determine whether a utility has [93] violated the Federal Constitution, citing *Pullman Co.* v. *I. C. C.*, 390 Ill. 40 (1945).

But that argument in this court's opinion is of no merit. As defendant correctly points out, the Commission not only may examine issues of federal constitutional law, but under the Supremacy Clause of the Constitution, (Article VI, Clause 2), is undoubtedly required to do so. It is fundamental that decisions of state regulatory bodies must conform to constitutional standards. See *Application of Northwestern Bell Telephone Co.*, 6 N.W. 2d 165 (S. Dak. 1942); *United States* v. *Mayo*, 47 F. Supp. 552 (D. C. Fla. 1942), affirmed 319 U.S. 441 (1943); *Sperry* v. *State of Florida ex rel. Florida Bar*, 373 U. S. 379 (1963).

The case of *Pullman Co.* v. *I. C. C.*, supra, cited by plaintiffs, does not support their position. In that case, the Supreme Court held that the Commerce Commission incorrectly based an order upon a federal statute, which was inapplicable to the facts in issue, and which neither party had thought relevant or adduced evidence upon. The Court did not hold that the Commission may not consider issues of federal law, but rather intimated [94] that in a proper case and after a proper hearing, the disputed statute would be applicable to matters coming before the Commission.

The courts have consistently declined jurisdiction over disputes within the competence of regulatory bodies. The doctrine of primary jurisdiction was first established by

the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1906). Its rationale was plainly spelled out by Mr. Justice Frankfurter in *Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952):

> "Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

See *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752 (1947); *Southwestern Sugar and* [95] *Molasses Co.* v. *River Terminals Corp.*, 360 U. S. 411 (1959); *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963).

The courts of this jurisdiction follow the doctrine. In *Chicago Automobile Trade Association* v. *Madden*, 328 F. 2d 766, 769 (7th Cir. 1964), although dealing with an exhaustion of remedies issue rather than one of primary jurisdiction,[2] the Court of Appeals for this Circuit required

---

2. The distinction between the doctrines of primary jurisdiction and exhaustion of remedies is this. Primary jurisdiction applies where, on the allegations made, the court and the agency have concurrent jurisdiction over the subject matter, but the issues are within the administrative competence of the agency. Exhaustion of remedies applies where the court does not acquire jurisdiction over the subject matter until the administrative remedies have been exhausted. Thus the agency's jurisdiction is considered to be exclusive.

In view of the disposition which we will make of this motion, we need not reach the question of whether the complaint sufficiently alleges a constitutional deprivation so as to be cognizable under Sec. 1983. Thus, technically, since the complaint alleges a claim arising under the Constitu-

the plaintiffs to fully exhaust their remedies before the Labor Board before turning to the courts. [97] The principles stated there are equally applicable here:

> "An allegation of unconstitutional harm is insufficient to warrant equitable intervention where pursuit of administrative remedies might ultimately render judicial disposition of such issues unnecessary. In an analogous situation in Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752 . . . it was observed that:
>
> > '. . . the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the Tax Court's final performance of its function. When that has been done, it is possible that nothing will be left of appellant's claim.' "

See *Vapor Blast Mfg. Co.* v. *Madden,* 280 F. 2d 205 (7th Cir. 1960).

In addition, the Illinois courts have consistently held that the procedures specified in the Public Utilities Act must be followed, before the aid of the courts may be invoked. *City of Wheaton* [98] v. *Chicago A. & E. Ry. Co.,* 3 Ill. App. 2d 29 (1954); *Colton* v. *Commonwealth Edison Co.,* 349 Ill. App. 490 (1953).

Indeed the Illinois Commerce Commission was created to deal with disputes of this kind, and in the course of its history has developed considerable expertise in these matters. Were we to bypass the Commission in this case, it is

---

tion, we have concurrent jurisdiction with the Commerce Commission, at this point. Thus primary jurisdiction, rather than exhaustion, is the proper doctrine to invoke in this situation. Since the underlying principles of both doctrines are the same, namely that the agency's expertise should initially be exercised, exhaustion cases such as Madden are equally persuasive in primary jurisdiction cases like this one.

conceivable that this court would be forced to decide every dispute between a subscriber and the telephone company in which constitutional allegations were made. We would be collaterally attacking the legislature's wisdom in creating the Commission were we to decide the merits of this case.

In light of the overwhelming preponderance of authority cited above, the Commerce Commission is the proper forum for this action. Plaintiffs' allegations of constitutional deprivation do not change that result. Indeed, defendant has set forth impressive authorities challenging the assertion that the right to receive Call-Pak service is constitutional in nature.[3] Furthermore, there [99] is a serious question whether, on these facts, plaintiffs may maintain a suit under section 1983.[4] But in view of the plaintiffs' failure to seek relief before the Illinois Commerce Commission

3. See *Holt* v. *New England Teleph. & Telegr.*, 11 P. U. R. 3d 502 (Mass. Comm. 1955); *Katz* v. *American Tele. & Telegr.*, 86 P.U.R.N.S. 65 (Fed. Commun. Comm. 1950). In addition, see *Sarelas* v. *Illinois Bell Tele. Co.*, 42 Ill. App. 2d 372 (1963), where the court held that the only relationship between a utility company and its subscriber is one of contract.

4. Plaintiffs mistakenly suggest that Judge Will's decisions in *Palma* v. *Wilson, et al.*, 66 C 437, and *Mamolella* v. *Powers, et al.*, 67 C 212, may be governing in the case at bar. Although Judge Will denied Illinois Bell's motions to dismiss and for summary judgment in those cases, the complaints alleged that Illinois Bell had conspired with certain police officers to discontinue plaintiffs' telephone service, and sought money damages in addition to equitable relief. Judge Will did hold that a cause of action was stated under Sec. 1983 on those facts since the alleged actions were taken under color of law. But he dismissed those parts of the complaints seeking restoration of service on the ground that they should properly be heard by the Illinois Commerce Commission. In the instant case, although both injunctive and monetary relief is sought, no conspiracy is alleged, so that there is serious question whether Illinois Bell, acting alone, acted under color of law.

before bringing this suit, our dismissal of this action must be based solely on that deficiency, and need not reach the other issues raised by defendant.

Defendant's motion to dismiss is granted.

[100] Enter: /s/ A. L. Marovitz,

Abraham L. Marovitz,
Judge.

Dated:
October 13, 1967.

[166] IN THE UNITED STATES DISTRICT COURT.
* * (Caption—67-C-510) * *

MEMORANDUM OPINION.

Defendant's Motion to Dismiss Amended Complaint.

In their Amended Complaint, plaintiffs claim that the actions of defendant Illinois Bell Telephone Company in discontinuing telephone service rendered to them in Kankakee and Skokie, Illinois, constitute a violation of their constitutional rights, as guaranteed by the First, Fourth, and Fourteenth Amendments. Jurisdiction is allegedly founded on the Civil Rights Act, 42 U. S. C. Sec. 1983, and on 28 U. S. C. Sections 1331, 1343.

In a memorandum opinion dated October 13, 1967, we dismissed plaintiff's original complaint as amended herein, on the ground that the Illinois Commerce Commission had primary jurisdiction over [167] the issues. The facts alleged in the amended complaint are essentially the same as set forth at pages 2-3 of that opinion. It, therefore, is unnecessary to restate them here. However, plaintiffs no longer seek equitable relief in the form of restoration of service, and do not charge that the applicable tariffs, under which defendant purportedly acted, are either violative of state law or the federal Constitution. They merely seek damages for the actions of defendant, under alleged color of law, which assertedly deprived them of their constitutional rights.

Defendant again moves to dismiss. However, we do not think the same considerations which guided our original order of dismissal may be relied upon here. The original complaint, inter alia, sought equitable relief and challenged the validity of certain tariffs and regulations governing the operations of defendant. As such, and in view of Section

72 of the Public Utilities Act of Illinois (Chap. 111⅔, Ill. Rev. Stat.), we believed the issues presented to be within the primary purview of the Illinois Commerce Commission. However, the issues now before the Court are essentially of a [168] legal character, directly presenting no issues of tariff construction, and are of a kind with which the Illinois Commerce Commission has no particular competence to deal. Furthermore, plaintiffs have eliminated their demand for equitable relief, the only remedy available before the Commerce Commission. It is clear that the Commission has no authority to award damages, the only relief presently sought by the plaintiffs.

Where the only issues relate to the constitutionality of certain activities of a public utility, and whether or not a customer of that utility has a constitutional right to such service, only legal questions of a kind not within the special expertise of the administrative commission need be decided. A federal court is the proper forum to decide those questions, and the doctrine of primary jurisdiction is inapplicable. Hence, by restyling their complaint, plaintiffs have avoided the thrust of our original order of dismissal.

However, the motion to dismiss presents several other issues. Defendant contends that plaintiffs have no constitutional right to telephone [169] service, which is protected by either the First, Fourth, or Fourteenth Amendments to the Constitution.

It must be recognized that this is a case in which the telephone company alone, is charged with conducting an illegal search and seizure upon plaintiff's property for the purpose of inspecting telephone equipment, and with unlawfully terminating plaintiff's telephone service. There is no allegation of a conspiracy with the police, as in *Palma* v. *Wilson*, No. 66 C 437, N. D. Ill., and *Mamolella* v. *Powers*, No. 67 C 212, N. D. Ill., or that the company's activities were carried out at the direction of the police as in *Sokol*

18

v. *Public Utilities Commission,* 53 Cal. Rept. 673, 418 P. 2d 265 (1966), all of which were cited in support of plaintiffs' position.

The law is reasonably clear that where telephone service is discontinued without adequate procedural safeguards, a customer may be able to bring an action in the federal courts against the telephone company for restoration of service. See *Telephone News System* v. *Ill. Bell Tele. Co.,* 220 F. Supp. 621 (N. D. Ill. 1962); *Andrews* v. *Ches. & Pot. Tel. Co.,* 83 F. Supp. 966 (D. D. C. 1949). The theory of such an action is less clear. After careful research [170] we have been unable to discover any reported cases involving the telephone company as sole defendant, which were brought under Sec. 1983, and in which only damages were sought. Indeed in virtually all of the cases brought to our attention, the police or other authorities have notified the phone company that the customer was conducting gambling or other illegal operations over the telephone, and have requested that service be disconnected. And, the plaintiffs have invariably sought equitable relief, rather than damages.

Even accepting their theory of arbitrary disconnection, plaintiffs have not demonstrated to the court that any First Amendment right has been violated. The dictum in *Sokol* v. *Public Utilities Comm.,* supra, should not be controlling in a suit brought under Sec. 1983. Indeed, if the termination was arbitrary, the plaintiffs have their remedy before the Illinois Commerce Commission. They may only pursue a civil rights action if some right, privilege or immunity has been abridged under color of law. In the absence of any persuasive authority that plaintiffs have a right to telephone service under the First Amendment which may have been [171] infringed by defendants' activities, we shall not create one.

Furthermore, we reject plaintiffs' contention that Illinois

Bell is governed by the Supreme Court decisions in *Camara* v. *Mun. Ct.*, 18 L. Ed. 2d 930 (1967); and *See* v. *Seattle*, 18 L. Ed. 2d 943 (1967). Those cases, which required governmental officials to obtain search warrants before entering private residences or commercial buildings for purposes of public health inspections have not been held applicable to private parties. Illinois Bell, although a public utility, is not a governmental entity. Defendant's right to inspect *its* equipment at reasonable hours is set forth in the tariff regulations governing its operations. Plaintiffs have not made a persuasive argument to justify extending the rationale of *See* and *Camara*, and we shall not do so. Hence, plaintiffs' allegations on this point do not state a claim upon which this action may be based.

Finally, plaintiffs raise a due process argument under the 14th Amendment. However, it appears that the only right of which plaintiffs conceivably could have been deprived without [172] due process of law is a property right. Our Court of Appeals has made clear that an action does not lie under Sec. 1983 where a person seeks to protect only property or monetary rights. *Ream* v. *Handley*, 359 F. 2d 728, 731 (7th Cir. 1966).

It appearing that the amended complaint does not state a cause of action under any of the theories advanced by plaintiffs, the amended complaint must be dismissed.

Enter: /s/ A. L. Marovitz,
Abraham L. Marovitz,
Judge.

Dated:

February 7, 1968.

LIBRARY
SUPREME COURT, U. S.

OFFICE OF THE CLERK, U.S.
FILED
AUG 2 6 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 296

THOMAS KADLEC, JAMES W. KADLEC, AND ISAAC GRINSTEAD,

Petitioners,

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION

JAMES R. BRYANT, JR.,
Room 27 A,
225 West Randolph Street,
Chicago, Illinois 60606,
Counsel for Respondent.

DONALD H. SHARP,
ROBERT V. R. DALENBERG,
DOUGLAS G. BROWN,
ALAN N. BAKER,
JOHN R. LUCKSTONE,
Of Counsel.

THE GUNTHORP WARREN PRINTING COMPANY, CHICAGO

INDEX

	PAGE
Opinion Below	1
The Question Presented for Review	1
Statement of the Case	2
Argument	4
Conclusion	9
Appendix	A1
Complaint	A1
Amendments to Complaint	A7
Amended Complaint	A10
Amendment to Amended Complaint	A18

Cases Cited

Andrews v. Chesapeake & Potomac Tel. Co., 83 F. Supp. 966 (D. D. C. 1947)	8
Browns v. Mitchell, 409 F. 2d 593 (10th Cir. 1969)	6
Burdeau v. McDowell, 256 U. S. 465 (1921)	7
Burton v. Wilmington Parking Authority, 365 U. S. 715, 722 (1961)	5, 6
Camara v. Municipal Court, 387 U. S. 523 (1967)	7
Christman v. Pennsylvania, 275 F. Supp. 434 (W. D. Pa. 1967), cert. denied, 393 U. S. 885 (1968)	6
Elders v. Consolidated Freightways Corp., 289 F. Supp. 630, 634 (D. Minn. 1968)	6
Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S. D. N. Y. 1968)	6
Illinois Bell Tel. Co. v. Miner, 11 Ill. App. 2d 44, 136 N. E. 2d 1 (1956)	7

Katz v. American Tel. & Tel. Co., 86 P. U. R. (n. s.) 65 (F. C. C. 1950) 8

Laffer v. Cincinnati & Suburban Bell Tel. Co., 144 N. E. 2d 158 (Ohio C. P. 1957) 8

Monroe v. Pape, 365 U. S. 167 (1961) 5

Reinke v. Richardson, 279 F. Supp. 155 (E. D. Wis. 1968) 6

Sarelas v. Illinois Bell Tel. Co., 42 Ill. App. 2d 372, 192 N. E. 2d 451 (1963) 7

See v. City of Seattle, 387 U. S. 541 (1967) 7

Sokol v. Public Utilities Commission, 65 Cal. 2d 247, 53 Cal. Rptr. 673, 418 P. 2d 265 (1966) 8

Taglianetti v. New England Tel. & Tel. Co., 81 R. I. 351, 103 A. 2d 67 (1954) 6, 8

Tollin v. Diamond State Tel. Co., 39 Del. Ch. 350, 164 A. 2d 254 (1960) 8

U. S. v. Classic, 313 U. S. 299 (1940) 5

Weyandt v. Mason's Stores, Inc., 279 F. Supp. 283 (W. D. Pa. 1968) 7

Williams v. Yellow Cab Co. of Pittsburgh, Pa., 200 F. 2d 302 (3rd Cir. 1952), cert. denied sub. nom. Dargan v. Yellow Cab Co., 346 U. S. 840 (1953) 6

STATUTES CITED

42 U. S. C. § 1983 4

Ill. Rev. Stat. Ch. 111⅓, §§ 33, 35, 36, 41, 53 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 296

THOMAS KADLEC, JAMES W. KADLEC, AND ISAAC GRINSTEAD,

Petitioners,

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 407 F. 2d 624.

THE QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the courts below were in error in holding that the plaintiffs' Amended Complaint (as amended) failed to state a claim upon which relief could be granted under Section 1983 of the Civil Rights Act (42 U. S. C. § 1983).

STATEMENT OF THE CASE

1. The Proceedings Below.

Plaintiffs Thomas and James Kadlec filed the original Complaint (p. A1, *infra*) in this cause on March 31, 1967. Their pleadings were subsequently amended three times.[1] "Amendments to the Complaint" (p. A7, *infra*) were filed on August 3, 1967, and subsequently an entirely new "Amended Complaint" was filed (p. A10, *infra*). The Amended Complaint itself was amended on February 14, 1968 (p. A18, *infra*). As a result of these amendments, Isaac Grinstead was added as a plaintiff and the original prayer for restoration of telephone service was dropped so that now only money damages are sought.

The District Court, pursuant to its second memorandum opinion, dismissed the amended pleading for it failed to state a claim upon which relief might be granted. The Court of Appeals affirmed.

2. The Plaintiffs' Allegations.

The Amended Complaint alleges that each of the three plaintiffs had his own separate residential telephone line (Amended Complaint, pars. 10, 17, 27, pp. A11, 13, 14, *infra*). On March 16 and 17, 1967, the defendant terminated service on these three lines (Amended Complaint, pars. 10, 15, 17, 26, 27, pp. A11-14, *infra*). The reasons for the termination are not alleged.[2] In addition, it is alleged

---

1. The record in this Court consists of the plaintiffs' Brief and Appendix and the defendant's Brief and Appendix from the court below, together with the opinion, judgment and order denying rehearing. For convenience we have reprinted the Complaint and each amendment in the Appendix to this Brief, *infra*.

2. In oral argument in the court below, plaintiffs' counsel stated plaintiffs had connected their own telephone extensions to the residential lines.

that on March 16, 1967, employees of Illinois Bell "searched" the premises of Thomas and James Kadlec (Amended Complaint, par. 20, p. A13, *infra*), presumably in connection with the termination of service. No search of Grinstead's premises is alleged. There is no allegation that any of plaintiff's property was seized or removed.

James Kadlec and Thomas Kadlec are partners in an automobile parts business named "Skokie Automotive" located in Niles, Illinois (Amended Complaint, par. 16, p. A12, *infra*). The Amended Complaint mentions that Thomas Kadlec has a business in Kankakee, Illinois (Amended Complaint, par. 9, p. A11, *infra*), but does not indicate the nature of the Kankakee business; in the original Complaint this was stated to be an auto parts business (Complaint, par. 4, p. A1, *infra*).

The three telephones that were terminated were in premises adjacent to the Niles and Kankakee businesses (Amended Complaint, pars. 9, 27, 16, Complaint, par. 5, pp. A11, 14, 12, 2, *infra*). The original Complaint alleged that the Kadlecs' Niles business was served by two other telephone lines (Complaint, par. 6, p. A2, *infra*), and their Kankakee business also had two other lines (Complaint, par. 9, p. A3, *infra*). There is no allegation that service on these four business telephone lines was terminated. Thus, the inventory of business and residential telephones as as follows:

Location	Number	Disposition
1. In Kankakee		
a) In business premises	WE 9-3534	In Service
	WE 9-3535	In Service
b) In adjacent small house	258-3811	Terminated
c) In adjacent caretaker's trailer	WE 2-3964	Terminated
2. In Niles		
a) In business premises	NE 1-1199	In Service
	NI 7-9320	In Service
b) In adjacent residence	NI 7-8145	Terminated

The plaintiffs initially alleged that two of the terminated lines (at the small house in Kankakee and at the Niles residence) were for Call-Pak service (Complaint, pars. 7, 10, 11, pp. A2, 3, *infra*). Call-Pak provides residential telephone service based upon a flat fee rather than upon the customary time-distance-unit cost basis on which business telephone service is normally provided. Call-Pak is a special service for residential use only; it is not available for business use.

ARGUMENT

The Court of Appeals and the District Court each concluded that the amended pleadings failed to state a claim upon which relief might be granted and that the normal, day-to-day business of Illinois Bell is not conducted under color of state law. This conclusion is correct and there is no occasion for further review.

In essence, the Petition presents only a private controversy as to plaintiffs' right to telephone service under their contract with defendant and as to their obligation to allow the telephone company access to its equipment. By endeavoring to clothe their Complaint in constitutional garb, plaintiffs hope to gain review by this Court. Clearly such review should be denied. The Petition raises no important questions of federal law, no decision in conflict with this Court's opinions, and no deviation from accepted judicial procedure by the lower courts to warrant the exercise of this Court's supervisory powers. Rather, it presents a case of alleged breach of contract and private trespass that has received ample and fair consideration by the courts below.

Plaintiffs ground their claim for damages on the Civil Rights Act of 1871, 42 U. S. C. § 1983.[3] To state a claim

3. The Court of Appeals held no claim was stated under 42 U. S. C. § 1985. This is correct, albeit unnecessary, for plaintiffs have never relied upon an equal protection claim under that section; reference to that section was abandoned below where plain-

plaintiffs must allege (1) they have been deprived of a right, privilege or immunity secured by federal law or the United States Constitution, and (2) that the defendant's action was taken under color of law. *Monroe* v. *Pape*, 365 U. S. 167 (1961); see *U. S.* v. *Classic*, 313 U. S. 299 (1940). A private dispute, such as that alleged here, is not covered by Section 1983. See *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961).

The Amended Complaint, as amended, alleges no facts showing that the State of Illinois was in any way involved with the termination of plaintiffs' telephone service. Plaintiffs merely assert the bare conclusion that defendant acted "under color of law or regulations of the State of Illinois" (Amended Complaint, par. 29, p. A15, *infra;* see also par. 21, p. A14, *infra*). No state statutes or regulations purportedly clothing the defendant with governmental authority in terminating telephone service are cited. Instead, plaintiffs argue that because defendant provides, and in this instance terminated, service in accordance with its own published tariffs, state action is necessarily involved. Even here, the Amended Complaint does not identify which tariff provisions plaintiffs decry[4] and implicit in their argu-

tiffs advised both courts that the only issues concerned § 1983 (Plaintiffs' Brief in Opposition to Motion to Dismiss, par. 1, Defendant's Appendix in the Court of Appeals, p. 16; "Contested Issues", Appellants' Brief in the Court of Appeals, p. 8).

4. Exhibit A to the "Amendments to Complaint", filed August 3, 1967 (pp. A8-9, *infra*) is a copy of two of defendant's tariffs that were then in effect. Plaintiffs there alleged defendant's action was in part due to these two tariffs, but all references to them were dropped when plaintiffs filed the Amended Complaint. We are unsure what reliance plaintiffs now place on these allegations for they have printed in their Appendix to the Petition only the "ownership" tariff, presumably to show a reason for defendant's action. Defendant acted because it concluded that plaintiffs breached the terms of several tariffs and improperly used Cal-Pak service by connecting their own extensions from their residence lines to their business premises in an effort to avoid the higher cost of business telephone service.

ment, of course, is that defendant's action was properly taken pursuant to the tariffs' terms.

The application of plaintiffs' theory would "render the concept of state action [*i.e.*, color of law] a hollow and superfluous element". *Elders* v. *Consolidated Freightways Corp.*, 289 F. Supp. 630, 634 (D. Minn. 1968). Plaintiffs' view would place every dispute between a telephone company and subscriber resulting in termination of service within the scope of the Civil Rights Act. It is not sufficient to claim merely that a defendant has some connection with the state. *Reinke* v. *Richardson*, 279 F. Supp. 155 (E. D. Wis. 1968); *Christman* v. *Pennsylvania*, 275 F. Supp. 434 (W. D. Pa. 1967), *cert. denied*, 393 U. S. 885 (1968). The allegations must show that the claimed state involvement was significantly associated with the challenged activity (*Browns* v. *Mitchell*, 409 F. 2d 593 (10th Cir. 1969); *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535 (S. D. N. Y. 1968)) and that the state's involvement was such that the private defendant became clothed with the power, prestige or position of the state itself. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). This plaintiffs have failed to do. The Amended Complaint does not allege (nor does the Petition present in argument) any facts showing a relationship between the State of Illinois and the defendant as to the decision to terminate, or the act of terminating, the telephone service. It is not claimed that a state policy of discrimination was being effectuated by the private defendant or that the plaintiffs have been treated differently from other persons whose conduct has been similar.

The presence of the state is not injected merely because in terminating service the telephone company carefully followed its own tariffs, and thus the terms of its contract with the subscribers. *Taglianetti* v. *New England Tel. & Tel. Co.*, 81 R. I. 351, 103 A. 2d 67 (1954); *Williams* v. *Yel-*

low Cab Co. of Pittsburgh, Pa., 200 F. 2d 302 (3rd Cir. 1952), *cert. denied sub. nom. Dargan* v. *Yellow Cab Co.*, 346 U. S. 840 (1953); *Weyandt* v. *Mason's Stores, Inc.*, 279 F. Supp. 283 (W. D. Pa. 1968). The tariff schedules prepared by the defendant, or the other 60-odd telephone companies in Illinois, (ILL. REV. STAT. Ch. 111⅔, §§ 33, 35, 36 (1967)) are entirely different from the rules, regulations and orders of the Illinois Commerce Commission (ILL. REV. STAT. Ch. 111⅔, §§ 41, 53 (1967)). The company tariffs must be placed on file with the Commission but may go into effect after a notice period without formal Commission action (ILL. REV. STAT. Ch. 111⅔ §§ 35, 36 (1967)). Once in effect the tariff schedules simply provide the basis for the private contract between the company and the subscriber. *Sarelas* v. *Illinois Bell Tel. Co.*, 42 Ill. App. 2d 372, 192 N. E. 2d 451 (1963); *Illinois Bell Tel. Co.* v. *Miner*, 11 Ill. App. 2d 44, 136 N. E. 2d 1 (1956). Plaintiffs do *not* claim that service was terminated pursuant to an order of the Commerce Commission. The court below was entirely correct in holding:

> "The mere filing of these regulations with the state neither clothed Illinois Bell with state authority nor did it bring it under the aegis of the state. . . . Here, the nexus between the state and defendant's conduct was not sufficient to maintain an action under § 1983." (407 F. 2d at 626-627)

The plaintiffs' reliance on *Camara* v. *Municipal Court*, 387 U. S. 523 (1967) and *See* v. *City of Seattle*, 387 U. S. 541 (1967) to support their contention that the Fourth Amendment is applicable is entirely misplaced. Both cases involved *governmental action* and thus have no application here. *Burdeau* v. *McDowell*, 256 U. S. 465 (1921). In *Camara* the court made this distinction clear by pointing out:

> "The basic purpose of this [Fourth] Amendment,

> as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions *by governmental officials.*" (387 U. S. at 528; emphasis supplied)

Plaintiffs' argument as to the First and Fourteenth Amendments is not supported by the decisions cited. They rely upon *Sokol* v. *Public Utilities Commission,* 65 Cal. 2d 247, 53 Cal. Rptr. 673, 418 P. 2d 265 (1966); *Tollin* v. *Diamond State Tel. Co.,* 39 Del. Ch. 350, 164 A. 2d 254 (1960); *Laffer* v. *Cincinnati & Suburban Bell Tel. Co.,* 144 N. E. 2d 158 (Ohio C. P. 1957) and *Andrews* v. *Chesapeake & Potomac Tel. Co.,* 83 F. Supp. 966 (D. D. C. 1947). In all four of these decisions *all* telephones were removed *by police* during a gambling raid, or *total* disconnection was threatened in a directive *from law enforcement agencies.* Cases involving police intervention do not support plaintiffs' thesis here. Where, as in the instant case, the telephone company acts alone in its own business interest, no constitutional question is presented. *Taglianetti* v. *New England Tel. & Tel. Co.,* 81 R. I. 351, 103 A. 2d 67 (1954); *Katz* v. *American Tel. & Tel. Co.,* 86 P. U. R. (n. s.) 65 (F. C. C. 1950).

CONCLUSION

The decision of the Court of Appeals correctly interprets the Civil Rights Act and is not in conflict with any prior decisions of this Court, or of any other court. Further review is not warranted.

Respectfully submitted,

JAMES R. BRYANT, JR.,
Room 27 A,
225 West Randolph Street,
Chicago, Illinois 60606,
Counsel for Respondent.

DONALD H. SHARP,
ROBERT V. R. DALENBERG,
DOUGLAS G. BROWN,
ALAN N. BAKER,
JOHN R. LUCKSTONE,
Of Counsel.

August 1969.

APPENDIX

COMPLAINT

Now come Thomas Kadlec and James W. Kadlec, plaintiffs herein, by Harry R. Booth, their attorney, and complaining of the defendant, Illinois Bell Telephone Company, allege:

1. Plaintiffs Thomas Kadlec and James W. Kadlec are residents of the County of Cook, State of Illinois and are citizens of the United States.

2. The defendant, Illinois Bell Telephone Company, a corporation, organized under the laws of the State of Illinois (hereinafter referred to as "IBT"), is engaged in rendering telephone service in the said City of Chicago and County of Cook. It is part of the nationwide American Telephone and Telegraph system, of which it is a subsidiary. IBT's principal office is located in the City of Chicago.

3. This Court has jurisdiction over this Complaint under Title 42, U. S. C. 1983, 28 U. S. C. 1331 and 1343 and Amendment I and Section I of Amendment XIV of the Constitution of the United States.

4. Plaintiff, Thomas Kadlec, has been engaged for more than 10 years in the business of selling automobile parts and related operations, including the rebuilding of certain parts, at wholesale and retail under the names of Kankakee Auto Parts and Skokie Automotive. Such business is operated at two locations, the largest of which is near the City of Kankakee and the other in Niles, both in the State of Illinois. James Kadlec is a partner of his brother, Thomas Kadlec, in the Skokie operations, but participates

in the Kankakee business as an employee. Both businesses combined generally employ from 6 to 8 persons. Such businesses are also among the largest of their kind in the areas in which they operate, and the Kankakee Auto Parts is the largest of its kind in both the city of Kankakee and the county in which that city is located.

5. Plaintiff James Kadlec operates separate buildings used for residential and business purposes at both locations. 7254 Milwaukee Avenue, Niles, contains a two-story residence and another building used for the sale and storage of auto parts. James Kadlec, and his sister, Rosemarie Kadlec, and their parents live in the two-story residence on Milwaukee Avenue.

6. IBT renders service to plaintiff, Thomas Kadlec, for his Skokie Automotive operations, under contracts, with telephone numbers NEwcastle 1-1199, a direct Chicago line, and NIles 7-9320. Both such lines have been advertised at substantial expense by Plaintiff and are used by customers or prospective customers calling Plaintiffs' Niles business operated under Skokie Automotive.

7. On or about August 1, 1964, IBT, at plaintiff, Thomas Kadlec's request, contracted to install a Call-Pak line, number NIles 7-8145 in the aforesaid residence for the use of James and Rosemarie Kadlec. Such number, though unlisted, has been given by James Kadlec to various persons who communicate with him largely for personal reasons. Such number was also given to the United States Army, in accordance with its regulations requiring that plaintiff, a Captain in the Reserve Army, be available for emergency or other service.

8. Such number has also been given to the Niles Police Department, who from time to time call it for emergency nighttime towing service performed by plaintiffs Thomas

Kadlec and James Kadlec, in accident or other emergency situations.

9. IBT renders service to plaintiff Thomas Kadlec at its Kankakee business, with numbers WE 9-3534 and 3535, which are used primarily for incoming and outgoing telephone calls of such business.

10. IBT also furnished plaintiff Thomas Kadlec in 1965 with a Call-Pak line, number Peotone 258-3811, at a monthly minimum rate of $97.50, which was installed in a small house located on such Kankakee property. In the same year it installed number WE 2-3964 at plaintiff's request in a trailer located just outside of such Kankakee properties. The trailer is occupied by Isaac Grinsted and his wife. Grinsted, who is over 60 years old and retired, lives in the trailer. He acts as a night watchman of such Kankakee property for the purpose of protecting it and the business from theft and fire. As part of the consideration for such services plaintiff pays for his telephone and other utility bills.

11. The aforesaid telephone equipment at such numbers was installed by IBT employees who had knowledge that lines 258-3811 and NI 7-8145 had contracted for Call-Pak service.

12. Although plaintiff Thomas Kadlec, had ordered NI 7-8145, James Kadlec, from time to time, directly paid IBT for service rendered under such line.

13. As of March 18, 1967 plaintiffs had received no notice of any kind from IBT that it was dissatisfied in any way with the use by plaintiff, or any agent or employee of his, of any of the telephone lines or service provided by IBT to the plaintiff or his agents.

14. The plaintiffs and their agents used IBT's communication facilities as an indispensable, established and recognized means of communication and speech with

various persons located primarily in the State of Illinois and also with persons in other states.

15. The American Telephone & Telegraph System, including IBT, furnishes over 80% of the telephone service in the United States.

16. IBT, in providing such telephone service to the plaintiffs, had agreed to furnish a means of communication to the plaintiffs or their duly authorized agents.

17. Communication by telephone has become a normal, regular and frequently an indispensable means of expression by practically all citizens of the United States either for residential, educational, personal, commercial and/or other related purposes.

18. The communication means provided by IBT through its telephone service and facilities when used by the plaintiffs constitutes a means of speech within the protection afforded citizens of the United States under the Constitution of the United States.

19. On March 16, 1967 and on March 17, 1967, IBT, without prior notice to the plaintiffs or their agents, disconnected telephone numbers PEotone 258-3811, WE 2-3964 and NI 7-8145.

20. As of March 16, 1967, plaintiff was substantially current in the payment of his telephone bills for any and all service rendered to him.

21. Plaintiffs had a property interest in the contracts with IBT in the furnishing of such telephone service under numbers NI 7-8145, PEotone 258-3811, and WE 2-3964. Such property interest was protected as a property right under the Constitution of the United States.

22. IBT, in discontinuing plaintiff's telephone service, purported to do so under the Public Utility Laws of the State of Illinois, Chapt. 111-2/3, Ill. Rev. Stats., 1965, or

regulations filed by it with the Illinois Commerce Commission which have the force and effect of law.

23. IBT did not, prior to its acts in discontinuing such telephone service, furnish plaintiffs or their agents with copies of any such regulations or rules or any other documents under which it discontinued such telephone service.

24. Any such Regulations, Rules or Laws of the State of Illinois under which IBT discontinued plaintiffs' telephone service violate and are contrary to Amendments I and XIV of the Constitution of the United States.

25. Plaintiffs have no remedy under the Laws of the State of Illinois for the protection of their rights under Amendments I and XIV as a result of the wrongful acts committed by the defendant IBT in violating such rights. Plaintiffs have suffered humiliation and harrassment as a result of the wrongful acts of IBT in discontinuing such telephone service. All such acts of IBT in discontinuing such telephone service are contrary to and in violation of Title 42 U. S. C. 1983, 28 U. S. C. 1343 and Amendment I and Section I of Amendment XIV of the Constitution of the United States.

26. Plaintiffs are suffering great and irreparable injury and damage as a result of the wrongful acts of IBT in discontinuing such telephone service.

27. Plaintiffs are suffering damages of a large and substantial character as a result of such wrongful acts.

28. The acts of IBT in discontinuing such service are of a wilful and reckless character.

29. Plaintiffs are entitled to temporary and permanent injunctive relief restraining defendant from discontinuing any other telephone service or equipment and a Mandatory injunction requiring it to restore all such telephone service and lines WE 2-3964, PEotone line 258-3811 and NI 7-8145.

30. Plaintiffs are entitled to the recovery of compensatory and punitive damages for the wrongful acts of IBT in discontinuing such service and additional such damages for each day during which such service continues to be disconnected.

Now, Therefore, plaintiffs, Thomas Kadlec and James W. Kadlec, pray that this Honorable Court enter the following orders or decrees:

1. Issue a temporary and permanent injunction directing Illinois Bell Telephone Company to restore telephone service forthwith and telephone lines WE 2-3264 and PEotone line 285-3811 and NI 7-8145.

2. Enter a temporary injunction preventing IBT from discontinuing any other service rendered by it to plaintiffs.

3. Award plaintiff, Thomas Kadlec, damages of $100,000.00 against IBT for its wrongful acts in discontinuing any one or all of such telephone lines and service.

4. Award plaintiff, James W. Kadlec, damages of $50,000.00 against IBT for its wrongful acts in discontinuing any one or all of such telephone lines and service.

5. Award each plaintiff additional damages of $250.00 per day for each of the lines which have been discontinued until such service has been restored.

6. Enter such further orders and decrees as may be just and necessary under the premises.

AMENDMENTS TO COMPLAINT.

Now Come the Plaintiffs, James Kadlec et al., by their attorney, Harry R. Booth, and pray for leave to Amend their Complaint by adding the following to their Complaint. Paragraph 3 is hereby amended as follows:

3. This Court has jurisdiction over this Complaint as amended under Title 42, U. S. C. 1983, 28 U. S. C. 1331 and 1343 and Amendments I, IV and Section I of Amendment XIV of the Constitution of the United States.

19 A. The Defendant, on or about March 16, 1967 or thereafter, entered the premises of the Plaintiffs in Kankakee and Niles, Illinois, without their consent and under threat of discontinuing all their telephone service conducted a search of such premises.

19 B. The Defendant, thereafter, under the threat of discontinuing all of Plaintiff's telephone service, again entered the premises and seized telephone equipment previously used by Plaintiffs for telephone service furnished by the Defendant to Plaintiffs.

19 C. All such acts of the Defendant were under color of law or by virtue of regulations or customs having the force and effect of law.

19 D. All such acts were under regulations filed by IBT with the Illinois Commerce Commission and, particularly, paragraphs 5 and 6, attached hereto as Exhibit "A".

19 E. IBT entered such premises and property of the Plaintiffs without a search warrant or any other similar authority approved by a judicial officer of the State of Illinois or otherwise.

19 F. All such acts were without prior notice and an opportunity for a hearing before such acts were committed before any judicial or administrative officer of the State of Illinois.

19 G. IBT's officers and agents during their entry and search of the premises of its subscribers, such as the Plaintiffs on information and belief attempt to secretly collect information as to the law abiding character of such subscribers.

19 H. The only remedy available to Plaintiffs before the said Illinois Commerce Commission would be by the filing of a Complaint with the said Commission after IBT had, without prior hearing and a notice conducted a search of Plaintiff's property and discontinued its service. Such a hearing would be extended and prolonged and would not involve an adjudication or determination of the rights of Petitioner of Plaintiffs under the Constitution of the United States.

19 I. All such acts of the Defendant were in violation of Amendments I, IV or XIV, Sec. I of the Constitution of the United States.

ILL. C. C. NO. 1
Section 1
Second Revised Sheet 1
Canceling First Revised Sheet 1

ILLINOIS BELL TELEPHONE COMPANY
General Local Exchange Tariff
Telephone Service

GENERAL REGULATIONS

1. The general regulations specified herein are supplementary to the regulations contained in other sections of this tariff. Any lawful change in regulations or in rates acts to that extent and without further notice as a modification of all subscribers' contracts.

• • • • •

5. OWNERSHIP AND USE OF THE EQUIPMENT—Equipment, instruments and lines on subscriber's premises, fur-

nished by the Telephone Company, shall be and remain the property of the Telephone Company, whose agents and employees have the right to enter said premises at any reasonable hour for the purpose of installing, inspecting or repairing the instruments and lines or for the purpose of making collections from coin boxes and, upon termination of the service, for the purpose of removing such instruments and lines. Such equipment is not to be used for performing any part of the work of transmitting, delivering or collecting any telephone message where any toll or consideration has been or is to be paid any party other than the Telephone Company, without the written consent of the Telephone Company.

6. UNAUTHORIZED ATTACHMENTS OR CONNECTIONS—No equipment, apparatus, circuit or device not furnished by the Telephone Company shall be attached to or connected with the facilities furnished by the Telephone Company, whether physically, by induction or otherwise, except as provided in this tariff. In case any such unauthorized attachment or connection is made, the Telephone Company shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service.

Issued June 30, 1964 Effective August 1, 1964

By G. L. Seaton, Assistant Vice President
212 West Washington Street, Chicago, Illinois 60606

AMENDED COMPLAINT.

Now Come Thomas Kadlec, James W. Kadlec, and Isaac Grinstead, plaintiffs, by Harry R. Booth, their attorney, and complaining of the defendant, Illinois Bell Telephone Company, allege:

1. Plaintiffs Thomas Kadlec and James W. Kadlec are residents of the County of Cook, State of Illinois and are citizens of the United States. Isaac Grinstead, plaintiff, is a resident of the County of Kankakee, State of Illinois and a citizen of the United States.

2. The defendant, Illinois Bell Telephone Company, a corporation, organized under the laws of the State of Illinois (hereinafter referred to as "IBT"), is engaged in rendering telephone service in the said City of Chicago and County of Cook. It is part of the nationwide American Telephone and Telegraph system, of which it is a subsidiary. IBT's principal office is located in the City of Chicago.

3. This Court has jurisdiction over this Complaint under Title 42, U. S. C. 1983, 1985, 28 U. S. C. 1331(a) and 1343 and Amendments I and IV and Section I of Amendment XIV of the Constitution of the United States.

4. By this action Plaintiffs seek damages against IBT for the deprivation of their rights and privileges secured by the laws and Constitution of the United States arising out of (a) its unlawful entry under color of law upon the property of the Plaintiffs or one or more of them (b) the abridgement of the right of freedom of speech and means of communication under color of law in violation of Amendment I (c) the denial of due process in violation of Section 1 of Amendment XIV and (d) the violation of 28 U. S. C. Sec. 1983 and 1985 by acts more fully shown herein.

5. IBT at all times acts under color of laws or regula-

tions in rendering telephone service to Plaintiffs or other customers, in discontinuing such service or in entering upon the premises of its customers including the Plaintiffs or one or more of them.

6. IBT individually and as part of the American Telephone and Telegraph system provides one of the primary means for oral expression to the Plaintiffs and to more than 85% of the people of the United States for residential, commercial, scientific, educational, health and other purposes. IBT and AT&T facilities transmit information regularly in other forms including writing, music, pictures as well as speech. As public utilities and engaged in interstate transmission, IBT and AT&T are bound by Sec. 1 of Amendment XIV not to discontinue telephone service without according their customers their rights of due process of law.

7. Communication by telephone has become a normal, regular and an indispensable means of expression by practically all citizens of the United States either for residential, educational, personal, commercial and/or other related purposes.

8. The communication facilities provided by IBT and AT&T through their telephone service and equipment when used by the plaintiffs or other subscribers or users constitutes a means of speech within the protection afforded citizens of the United States under the Bill of Rights of the Constitution of the United States.

9. Isaac Grinstead, plaintiff herein, and his wife reside in a trailer on the outskirts of the City of Kankakee, Illinois. Such trailer is located in a non-otherwise populated area and adjoins the commercial property and business of the plaintiff Thomas Kadlec, but it is not located upon it.

10. Some time prior to January 1, 1966 IBT installed its telephone equipment and facilities in such trailer and

began furnishing telephone service to the said Grinstead, and his wife under telephone number WE 2-3964. Such service was used by them for usual residential purposes.

11. Grinstead who is over the age of 60 also acts as a nightwatchman for Plaintiff Thomas Kadlac for his extensive Kankakee property adjoining such trailer. On occasion such telephone service might be used in order to aid in protecting such property against fire, theft or related purposes.

12. In view of the isolated location of such trailer, IBT's telephone service was an indispensable means of communication by the said Grinsteads for their health and other residential purposes.

13. Plaintiff Thomas Kadlec acted as the said Isaac Grinstead's agent in providing such service. From the time such service was installed until it was shut off on March 17, 1967 by IBT and thereafter IBT sent all bills for such service to the said Thomas Kadlec who regularly paid IBT for such service. The total annual bill for such service during 1966 was approximately $100 and seldom if ever has the monthly bill exceeded $10 per month since such service was connected by IBT.

14. At no time prior to March 16, 1967 or subsequent thereto has IBT furnished plaintiffs or either of them any statement in writing alleging that such service was used by the said Grinsteads in violation of any rule or regulation of IBT, any law of the State of Illinois or that of the United States.

15. On March 16, 1967 without prior notice to the plaintiffs or either of them the defendant IBT arbitrarily, illegally and willfully shut off the telephone service rendered to Plaintiff Grinstead and his wife.

16. Plaintiff James Kadlec resides at 7254 Milwaukee Avenue, Niles, Illinois, in a 2-story residence. He and his

sister Rosemarie and their parents are the sole occupants of such building though they live in separate apartments. James Kadlec is a partner with his brother Thomas Kadlec in the operation of their business under the name of Skokie Automotive. Such business in which Thomas Kadlec has been engaged in for more than 10 years relates to the sale of automobile parts and related operations, including the rebuilding of certain parts, at wholesale and retail.

17. On or about August 1, 1964, IBT installed telephone equipment and facilities for the use of James and Rosemarie Kadlec in the above residence under the telephone number NIles 7-8145. IBT then began rendering such telephone service to them which was used by them for their personal business.

18. Such number was given by James Kadlec to various persons who communicate with him largely for personal reasons. Such number was also given to the United States Army, in accordance with its regulations requiring that plaintiff, a Captain in the Reserve Army, be available for emergency or other service. In addition, such telephone number was furnished to the Niles Police Department, who, from time to time, call it for emergency nighttime towing service performed by plaintiffs, Thomas Kadlec and James Kadlec, in accident or other emergency situations.

19. Plaintiff, Thomas Kadlec, acted as the agent of James and Rosemarie Kadlec from time to time in connection with such telephone furnished by IBT. Either he or James Kadlec paid for such telephone service and such payments were made in accordance with the rules and regulations of IBT.

20. On or about March 16, 1967, IBT, its agents and employees or either of them, entered the property of the Plaintiffs, Thomas Kadlec, and James W. Kadlec, or one

or more of them, in Niles and Kankakee County, Illinois, and engaged in a search of such premises and property.

21. Such search was conducted by IBT under color of law.

22. Such search was conducted by IBT without prior notice to the Plaintiffs or either of them.

23. Such search was conducted without a hearing, a search warrant or judicial proceeding.

24. Said search constituted an unreasonable search in violation of Amendment IV of the Constitution of the United States and constituted a deprivation of the rights of Plaintiffs, Thomas Kadlec and James Kadlec secured by the Constitution and laws of the United States.

25. On or about March 16 and 17, 1967, IBT, its officers, agents or employees, then and there, without prior notice or an opportunity to be heard, did shut off and destroy telephone service rendered by IBT under telephone numbers WE 2-3964 to the said Isaac Grinstead, plaintiff, and his wife.

26. On or about March 16 and 17, 1967, without prior notice or hearing to James Kadlec and Rosemarie Kadlec or any other plaintiff, IBT did then shut off and discontinue telephone service rendered by IBT to them under telephone number NIles 7-8145.

27. On or about March 16 and 17, 1967, without prior notice to plaintiff, Thomas Kadlec, or any other plaintiff herein, IBT did then shut off telephone service rendered by it under telephone number PEotone 258-3811 to Thomas Kadlec in a small house located on such plaintiff's kankakee property.

28. All such acts of discontinuing such telephone service were arbitrary and illegal and in violation of Amendments I and Section 1 of Amendment XIV of the Constitution of the United States.

29. All such acts of IBT in shutting off such service were under color of law or regulations of the State of Illinois.

29A. IBT and AT&T possess monopoly rights to serve 85% of the nation's telephone users including areas where Plaintiffs reside.

30. The acts of the defendant in shutting off such telephone service has, since March 16, 1967, deprived the plaintiffs herein, Isaac Grinstead, James Kadlec and Thomas Kadlec of their right of freedom of speech and means of communication guaranteed to them by Amendment I of the Constitution of the United States.

31. Any regulations, rules or laws of the State of Illinois or IBT pursuant to which IBT conducted a search of the premises of the plaintiffs Thomas Kadlec and James Kadlec, or either of them, or discontinued the telephone service of any of the plaintiffs herein are null and void in that they violate and are contrary to Amendments I, IV and XIV of the Constitution of the United States.

32. IBT in depriving plaintiffs Isaac Grinstead, Thomas Kadlec and James Kadlec of rights, privileges or immunities secured by the Constitution and laws of the United States acted in concert with numerous other persons, officers and agents of the State of Illinois in depriving such plaintiffs or one or more of them of their civil rights and of equal protection of the laws in violation of 42 U. S. C. Section 1985.

33. Plaintiffs and each of them have suffered large and substantial injury and loss including irreparable damage as a result of the aforesaid wrongful acts of IBT, its officers and agents.

34. The acts of IBT in depriving plaintiffs of rights under the laws of the United States and its Constitution are of a willful and wreckless character. IBT has for a

period of more than 25 years knowingly filed rules and regulations with one or more agencies of the State of Illinois and that of the United States for the purpose of obtaining immunity from its violations of the laws and Constitution of the United States.

35. Plaintiffs have no remedy for the wrongs committed by IBT and its officers and agents other than in this Court in that (a) No state or federal administrative agency is possessed with authority to award damages to the plaintiffs or either of them on account of the acts of IBT in violating the laws and Constitution of the United States as set forth in this Amended Complaint (b) only the Federal courts have been empowered by the Congress of the United States to award damages for such wrongful acts.

36. Plaintiffs are entitled to the recovery of compensatory and punitive damages on account of the wrongful acts of IBT in violating 42 U. S. C. 1983 and 1985 and Amendments I, IV and XIV. Plaintiffs are likewise entitled to punitive damages for each day during which IBT has failed to restore such telephone service to the plaintiffs which has been discontinued by it in violation of the rights of the plaintiffs under the laws and Constitution of the United States.

37. Plaintiff Thomas Kadlec is further entitled to additional punitive damages against IBT in that subsequent to March 17, 1967 under the threat of discontinuing and shutting off all of his business service in both Kankakee and Niles, Illinois, IBT again entered upon and searched the premises of the said plaintiff in violation of Amendment IV of the Constitution of the United States.

NOW THEREFORE Plaintiffs Thomas Kadlec, James Kadlec, and Isaac Grinstead, pray for a trial by jury and that upon such trial they be awarded judgment and damages as follows:

1. Plaintiff Thomas Kadlec is entitled to compensatory and punitive damages against Illinois Bell Telephone Company in the sum of $50,000 each on account of its violation of Amendment IV.

2. Plaintiff, Thomas Kadlec, is also entitled to damages of $50,000 and $200 per day since March 16, 1967 on account of Illinois Bell Telephone Company's violation of Amendment I and XIV of the Constitution of the United States and 42 USC 1983 and 1985.

3. Plaintiff, James W. Kadlec, is entitled to compensatory and punitive damages in the sum of $50,000 against Illinois Bell Telephone Company on account of its violation of Amendment IV of the Constitution of the United States.

4. Plaintiff, James W. Kadlec, is entitled to compensatory and punitive damages in the sum of $50,000 on account of Illinois Bell Telephone Company's violation of Amendments I and XIV, Section 1 and 42 USC 1983 and 1985. He is also entitled to compensatory and punitive damages of $200 per day since March 17, 1967, against Illinois Bell Telephone Company.

5. Plaintiff, Isaac Grinstead, is entitled to compensatory and punitive damages of $50,000 each from Illinois Bell Telephone Company on account of its violation of Amendment I and $200.00 per day for each day since March 16, 1967, until his telephone service is restored on account of its violation of Amendments I, XIV, Section 1 and 42 USC 1983.

6. Plaintiffs are also entitled to such further and additional relief as may be just and reasonable in the premises.

AMENDMENT TO AMENDED COMPLAINT

Now Comes the Plaintiffs, Thomas Kadlec, et al by their attorney Harry R. Booth, and by leave of Court amends paragraph 22 of their Amended Complaint as follows:

Paragraph 22 is amended by adding to it the words "or without their consent" so that such paragraph shall read as follows:

Such search was conducted by IBT without prior notice to the Plaintiffs or either of them or without their consent.

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 11 1969
JOHN F. DAVIS, CLERK

No. 296

In the Supreme Court of the United States

OCTOBER TERM, 1968

THOMAS KADLEC, JAMES W. KADLEC, and ISAAC GRINSTEAD,

Petitioners,

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF

HARRY R. BOOTH
30 N. LaSalle Street
Chicago, Illinois 60602
Attorney for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the
Supreme Court of the United States

OCTOBER TERM, 1968

No. 296

THOMAS KADLEC, JAMES W. KADLEC, and ISAAC GRINSTEAD,

Respondent.

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Petitioners,

PETITIONERS' REPLY BRIEF

Respondent (IBT) claims Petitioners' remedy is an action for private trespass or breach of contract and this Petition should be rejected as this case involves "'no important questions of federal law'', conflict with this Court's opinions do not exist nor is there any departure from accepted judicial procedure (p. 4). Thus they argue that the denial of rights arising from the long line of cases illustrated by *Bell* v. *Hood,* 322 US 678, 682, prohibiting the summary disposition of cases presenting constitutional issues have no application here. Equally ir-

relevant IBT urges is the construction of the Federal Rules governing pleadings. *Conley* v. *Gibson*, 355 US 41, 48. In this same immaterial category is the view expressed in *Dt. of Col.* v. *Little*, 178 F2d 13, 17 (1949) (*Affd.* on other grounds, 339 US 1) when the Court said:

> "To say that a man suspected of crime has the right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection is a fantastic absurdity."

In *Camara* 387 US 523 and *See* 387 US 541 this Court assured identical Fourth Amendment protection to both groups. The issue here is whether a state which may not authorize its own employees to violate this Amendment may confer such power upon public utilities asserting the right of entry without prior notice, a hearing or warrant against every resident and business institution in its borders. The time is ripe for the federal courts to consider and resolve this issue for this Court so directed the issue be decided on "a case by case basis". *See* v. *Seattle*, 387 US 541, 546.

Contrary to its claims, IBT by its Motions to Dismiss has conceded that it was enforcing legal rights conferred upon it by the comprehensive provisions of the Illinois Public Utilities Act affecting these and other aspects of its service.

In rejecting Petitioners' claims the Court of Appeals and Respondent both relied upon certain selected allegations in the original as well as Amended Complaint. IBT has also ventured beyond the record (1st par. p. 4 except 1st sentence, fn 2, p. 2, last sentence fn 4.) IBT and the Court of Appeals overlooked par. 22. (IBT App. p. A4,

A5) alleging IBT purported to act under the Illinois Public Utility Laws or its regulations having the force and effect of law (see also par. 19D, p. A7, IBT App.)

As IBT has on the one hand (see last sentence fn 4, p. 5) stated that it acted because it concluded plaintiffs breached the terms of several tariffs including wrongful connection of its equipment with its own facilities and on the other denied that such acts represent conduct under color of law (pp. 4-7) we have supplemented this brief by the April 6, 1967 letter of IBT's general attorney Gordon Winks, setting forth IBT's exact version of what transpired (see Appendix). We do not now consider it necessary to correct its misstatements but beyond question it contradicts IBT's present assertions that the state was not involved in its conduct (pp. 4-7). On the contrary, Winks' letter demonstrates conclusively that Respondent assumed it was empowered by its filed rules, Illinois statutes and acts of the Commission to make ex-parte determinations whether Petitioners as its customers violated Illinois law. It was thus likewise authorized to perform acts raising serious questions under Amendments I, IV and XIV.

The Public Utilities Act "is a part of the charter of every public utility company" in Illinois. *Streator Aqueduct Co.* v. *Smith,* 295 FED 385, 393. Since the comprehensive provisions of the Public Utility Act supersede the common law (*Terminal RR Asso.* v. *PUC,* 304 Ill. 312, 317, 136 NE 797 (1922)) every step of its service to the public including the aspects involved here arise directly out of authority conferred upon it by the statute or the Commission acting or failing to act thereunder.

The generally accepted principle applicable to the entry upon customer's premises and discontinuance of service was stated in *Carroway* v. *Carolina P&Lt. Co.*, 84 S.E.2d 728, 731 (So. Car. Sup. Ct.)

> "The foregoing rules and regulations have the force and effect of law and were binding on the plaintiff regardless of whether or not he agreed to them. . . ."

Contrary to IBT's claim its tariffs may go into effect without formal Commission action it is thus wholly immaterial whether the Commission acted formally or informally. Section 32 of the Illinois Public Utilities Act (p. 4A Pt. App.) provides:

> "All rules and regulations made by a public utility affecting or pertaining to charges of service to the public shall be just and reasonable."

True the preponderance if not 90% of Bell's system regulations filed with state Commissions may become effective without public hearings but in both cases they have the force and effect of law. Thus IBT's reliance upon its recent Illinois cases involving *Sareles* and *Miner* (p. 7) disregards their true significance for they hold IBT's legal duty "is determined by the particular provisions of the tariff on file with the Commission". (*Sareles*, 192 NE 2d 451, 453)

This Court may take judicial notice that IBT's basic contentions parallel the historic position of the Bell system with regard to its own remedies as compared to those of its customers. It possesses non-administrative remedies. (*IBT* v. *Miner*, 136 NE2d 1) It is strange that it now argues that Petitioners possessed a remedy for trespass when Bell System companies have successfully opposed such remedies arising out of entry upon customer's premises though under somewhat different circumstances.

Peace v. *Sou. Bell T&T Co.*, CA4 (1953); 208 F2 901, 902; *Plate* v. *Sou. Bell T&T Co.*, 98 FS 355, US Dt. Ct. D.S.C. (1951).

Here they originally argued by their two Motions to Dismiss that Petitioners' remedies were solely before the Illinois Commission (Opinions of Judge Marovitz pp. 9-19 Pet. App.).

The fictional character of administrative remedies to the preponderance of Bell system and other utility customers under state law (see Hearings Before Subcommittee On Intergovernmental Relations of the Committee on Government Operations, U.S. Senate, 91st Congress, First Session S. 607), Utility Consumers Counsel Act of 1969. Pages 91 ff, 361 ff, 567 ff, 649 ff, 1309-1310, 1350 ff.

The cases relied upon by IBT (pp. 6 & 7) are wholly inapplicable here. Four of them beginning with *Reinke*, 279 FS 155 involve actions by state prisoners or suits by university students. The *Elders* case, 289 F. Supp 630, 634, arose out of an action by discharged employees of a common carrier against its employer. The critical facts here are that IBT entered the premises of the plaintiffs for the purpose of enforcing its alleged legal rights against the Petitioners. As the defendants imply (fn 4, last sentence) it ex-parte concluded its Petitioners had violated several tariffs including using non Bell (Western Elec.) equipment. The implications of these regulations to the anti-trust laws was first noted in *Hush-A-Phone* v. *US*, 238 F2d 266, 268, 269 CA of C. Finally the FCC itself modified regulations such as par. 5. (IBT App. p. A8, A9). (See *In re Carterfone Device in Message Toll Service*, Nos. 16942, 17073, 13 FCC 2d, 420-441) (1968).

CONCLUSION

This case fully meets the test of the following controlling decisions: *Bell* v. *Hood,* 327 U.S. 678, 682; *Newburyport Water Co.* v. *Newburyport,* 193 U.S. 561, 579; *Evans* v. *Newton,* 382 U.S. 296, 300; *See* v. *Seattle,* 18 L. Ed. 943 (1967).

It should, therefore, grant this Petition.

Respectfully submitted,

THOMAS KADLEC, ET AL.
Petitioners

by HARRY R. BOOTH
30 North LaSalle St.
Chicago, Illinois
Attorney for Petitioners

APPENDIX

APPENDIX

(COPY)

ILLINOIS BELL TELEPHONE COMPANY
225 West Randolph Street
Chicago, Illinois 60606

Law Department

Area Code 312

Telephone 727-9411

April 6, 1967

Mrs. Roberta B. Moye
Acting Secretary
Illinois Commerce Commission
State Office Building
Springfield, Illinois 62706

Dear Mrs. Moye:

Re: Thomas Kadlec

A copy of Mr. Booth's letter to you dated April 4 reached me late yesterday. At the outset, I should make clear that the regular listed business telephone service at each of the two business locations mentioned in his letter was never disconnected at any time but is still working.

Our representatives visited the Kankakee location on March 16, 1967, and found three serious and deliberate tariff violations. Residence service was being used exclusively for business purposes; several telephones not furnished by us were connected to our equipment, thereby obtaining service without the payment required by tariff; and the person in charge of the premises refused to permit our representatives to complete their inspection of our property as authorized by paragraph 5, Section 1, of the General Local Exchange Tariff. We told that person that the unlisted residence service would be disconnected, and it was subsequently on that day. When our representatives visited the Niles location on March 17, 1967, they found two serious and deliberate tariff violations—the first and third above mentioned. We told Mr. Kadlec that the unlisted residence service would be disconnected, and it was subsequently on that day.

In the Chicago metropolitan areas residence Call-Pak includes a large number of unit calls in the regular monthly rate, but there is no similar business rate. This results in a very substantial difference in rates for heavy multi-unit usage. Of course, there is nothing wrong with an occasional use of a residence line for business purposes, but when there is no significant residential use there is a serious tariff violation. No one has any right to obtain business service at residence rates under these circumstances for any period of time, whether for purposes of notice, litigation, or otherwise. Section 39 of the Act ex-

pressly forbids such discrimination, and Section 77 makes it a misdemeanor for the customer as well as the utility.[1]

Our records show that a large number of multi-unit calls were made to business locations over both of the Call-Pak lines which were disconnected. We are in the process of computing it, but we believe it will show that the subscriber was deliberately attempting to get service at less than half price.

Very truly yours,

Gordon W. Winks

GWW:MD
Copy to Mr. Harry R. Booth

---

[1] IBT's contentions this case involves no important federal questions covers the shutting off of service without notice to the innocent bystanders Petitioner Grinstead (and his wife) Petitioners allegation (par. 12 IBT, App. A12) the Grinsteads require the service "for their health" was not academic. At this writing, they still lack telephone service notwithstanding IBT was informed of Mrs. Grinstead's recent hospitalization for gall bladder surgery and for arterioselerotic heart disease. The pleadings and IBT's attorney Winks letter leave no doubt IBT alone determines any obligations to comply with the constitutional safeguards relating to notice or hearing with respect to both discontinuance and search of customer's premises. There is no provision in IBT or Illinois Commission rules for prior notice or hearing or emergency of summary procedure preventing discontinuance of service or entry upon customer's premises. We think IBT agrees.